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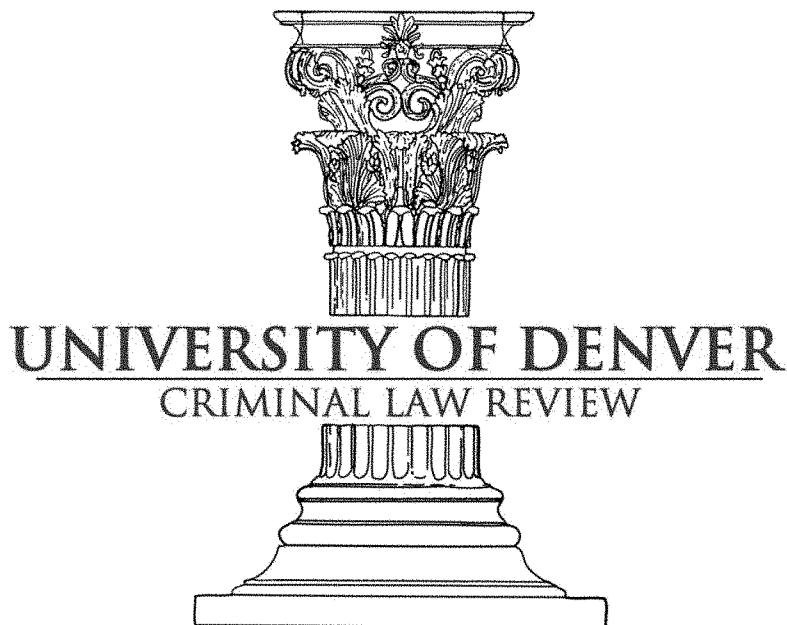
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## The Man Behind the Curtain: Confronting Expert Testimony

Daniel W. Edwards<sup>1</sup>

"The Court does not seek to cast aspersions upon the State Police or their technicians in making these observations but rather to underscore the fact that we must beware of putting too much trust in the man behind the curtain. Doing so threatens to undermine one of the fundamental trial protections defendants have enjoyed since this nation's founding."<sup>2</sup>

### I. INTRODUCTION

While *Melendez-Diaz*<sup>3</sup> addressed the Confrontation Clause and the issue of the introduction into evidence of testimonial certificates from experts, the *Crawford*<sup>4</sup>-*Davis*<sup>5</sup>-*Melendez-Diaz* line of cases do not address the issue of an expert's reliance on evidence that is otherwise inadmissible in forming their opinions or inferences. Even more importantly, these cases do not address the issue of permitting testimony at trial that involves inadmissible facts and data essential to the basis of the expert's opinion. This article first addresses the historical underpinnings of the Confrontation Clause and its current interpretation, and the historical and current status of experts is explored. In defining whether evidence is "testimonial," it is suggested that Justice Scalia's "objective witness" standard should be replaced with a "reasonable defendant" standard. The following issues are also raised and addressed: First, when it comes to experts, is someone – anyone – to provide testimony sufficient to satisfy the Confrontation Clause? Justice Thomas' limiting interpretation of the Confrontation Clause is considered as a possible solution in determining what may be testimonial and, therefore, what may be required to satisfy confrontation rights of a criminal defendant as it relates to experts. Second, whether business and public records are testimonial and, if testimonial, to what extent their use should be permitted at trial. The appropriate evidentiary analysis is explored with Fed. Rule Evid. 402 being a possible starting point in the confrontation analysis. Third, whether the balancing test in Fed. Rule Evid. 703 or an appropriately-fashioned limiting instruction under Fed. Rule Evid. 105 is sufficient to protect a criminal defendant's confrontation. Carefully drafted jury instructions that clearly advise jurors of the responsibility to be fact-finders are necessary for the protection of a criminal defendant's Confrontation Clause rights. Finally, this article seeks solutions to the problem of introducing an expert's inadmissible facts or data as the basis for an opinion or inference.

### II. THE CONFRONTATION CLAUSE

Described as an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal,"<sup>6</sup> the right to confront witnesses in a criminal case originates in the Sixth Amendment and was made applicable to the States through the Fourteenth

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<sup>2</sup> *People v. Carreira*, 893 N.Y.S.2d 844, 851 (N.Y. City Ct. 2010).

<sup>3</sup> *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2530 (2009).

<sup>4</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>5</sup> *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>6</sup> *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

Amendment.<sup>7</sup> The Sixth Amendment states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...." The clause has been interpreted as a "preference for face-to-face accusation."<sup>8</sup> Confrontation has been interpreted (1) to insure that statements presented to the jury are given under oath; (2) to force the witness against the defendant to submit to cross-examination; and (3) to test the credibility of the witness through the jurors' ability to view the demeanor of the witness as he testifies.<sup>9</sup> The citizens of the various States determined that the right was so important that it was included in State constitutions, either using the language of the Sixth Amendment as a right to "confront" or be "confronted,"<sup>10</sup> or as a right to meet the witnesses against the defendant "face to face."<sup>11</sup>

<sup>7</sup> *Id.* at 406.

<sup>8</sup> *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

<sup>9</sup> *California v. Green*, 399 U.S. 149, 158 (1970).

<sup>10</sup> See, e.g., ALA. CONST. art. I, § 6 ("That in all criminal prosecutions, the accused has a right ... to be confronted by the witnesses against him...."); ALASKA CONST. art. I, § 11 ("The accused is entitled ... to be confronted with the witnesses against him...."); ARK. CONST. art. II, § 10 ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...."); CAL. CONST. art. I, § 15 ("The defendant in a criminal cause has the right ... to be confronted with the witnesses against the defendant."); CONN. CONST. art. I, § 8 ("In all criminal prosecutions, the accused shall have a right ... to be confronted by the witnesses against him...."); FLA. CONST. art. I, § 16(a) ("In all criminal prosecutions the accused shall ... have the right ... to confront at trial adverse witnesses...."); GA. CONST. art. I, § 1, para. xiv ("Every person charged with an offense against the laws of this state ... shall be confronted with the witnesses testifying against such person."); HAW. CONST. art. I, § 14 ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against the accused...."); ILL. CONST. art. I, § 8 ("In criminal prosecutions, the accused shall have the right ... to be confronted with the witnesses against him or her...."); IOWA CONST. art. I, § 10 ("In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right ... to be confronted with the witnesses against him...."); LA. CONST. art. I, § 16 ("An accused is entitled to confront and cross-examine the witnesses against him...."); ME. CONST. art. I, § 6 ("In all criminal prosecutions, the accused shall have a right ... to be confronted by the witnesses against the accused...."); MD. CONST. art. XXI ("That in all criminal prosecutions, every man hath a right ... to be confronted with the witnesses against him...."); MICH. CONST. ch. 1, art. 1, § 20 ("In every criminal prosecution, the accused shall have the right ... to be confronted with the witnesses against him or her...."); MINN. CONST. art. I, § 6 ("The accused shall enjoy the right ... to be confronted with the witnesses against him...."); MISS. CONST. art. III, § 26 ("In all criminal prosecutions the accused shall have a right ... to be confronted by the witnesses against him...."); N.J. CONST. art. I, para. 10 ("In all criminal prosecutions the accused shall have the right ... to be confronted with the witnesses against him...."); N.M. CONST. art. II, § 14 ("In all criminal prosecutions, the accused shall have the right ... to be confronted with the witnesses against him...."); N.C. CONST. art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right ... to confront the accusers and witnesses...."); OKLA. CONST. art. II, § 20 ("He shall ... be confronted with the witnesses against him...."); PA. CONST. art. I, § 9 ("In all criminal prosecutions the accused hath a right ... to be confronted with the witnesses against him...."); R.I. CONST. art. I, § 10 ("In all criminal prosecutions, accused persons shall enjoy the right ... to be confronted with the witnesses against them...."); S.C. CONST. art. I, § 14 ("Any person charged with an offense shall enjoy the right ... to be confronted with the witnesses against him...."); TEX. CONST. art. I, § 10 ("He ... shall be confronted by the witnesses against him...."); UTAH CONST. art. I, § 12 ("In criminal prosecutions the accused shall have the right ... to be confronted by the witnesses against him...."); VA. CONST. art. I, § 8 ("That in criminal prosecutions a man hath a right ... to be confronted with the accusers and witnesses...."); VT. CONST. ch. 1, art. 10 ("That in all prosecutions for criminal offenses, a person hath a right ... to be confronted with the witnesses....").

<sup>11</sup> See, e.g., ARIZ. CONST. art. II, § 24 ("In criminal prosecutions, the accused shall have the right ... to meet the witnesses against him face to face...."); COLO. CONST. art. II, § 16 ("In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face...."); DEL. CONST. art. I, § 7 ("In all criminal prosecutions, the accused hath a right ... to meet the witnesses in their examination face to face...."); KAN. CONST. Bill of Rights, § 10 ("In all prosecutions, the accused shall be allowed ... to meet the witness face to face...."); KY. CONST. Bill of Rights, § 11 ("In all criminal prosecutions the accused has the right ... to meet the witnesses face to face...."); MASS. CONST. pt. 1, art. 12 ("And every subject shall have a right ... to meet the witnesses against him face to face...."); MO. CONST. art. I, § 18(a) ("That in criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face...."); MONT. CONST. art. II, § 24

In 1895 the United States Supreme Court addressed the right to confrontation in *Mattox v. United States*.<sup>12</sup> Although the case itself concerned the use of testimony from a former trial of the same action where two witnesses died before the second trial,<sup>13</sup> the Court held:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.<sup>14</sup>

But even the *Mattox* court perceived that the "general rules of law" "must occasionally give way to considerations of public policy and the necessities of the case."<sup>15</sup> The Court held that exclusion of transcripts of the witnesses' testimony, even though the defendant did not have a current opportunity to cross-examine, "would be carrying his constitutional protection to an unwarrantable extent."<sup>16</sup>

The Confrontation Clause has never been interpreted literally to require that any and all information from any source be produced through the testimony of a witness available for cross-examination. Because it has never been so interpreted, the analysis of the Confrontation Clause has always been a matter of line-drawing. Legal line-drawing must be based upon a rational basis and have criteria that requires just results.

Thus, to come as close to the language of the Confrontation Clause and in the usual case, the prosecution must produce the witness for cross-examination or demonstrate the unavailability of that witness.<sup>17</sup> Under *Ohio v. Roberts*, now superseded by *Crawford v. Washington*<sup>18</sup>, to be admissible a statement where the witness was unavailable required a showing of "indicia of reliability."<sup>19</sup> Under *Roberts*, statements were presumed reliable if they came within a "firmly rooted hearsay exception,"<sup>20</sup> or there was a showing of "particularized guarantees of trustworthiness."<sup>21</sup> In *Roberts*, the prosecution sought to admit the preliminary hearing transcript of a witness who did not appear at trial.<sup>22</sup> An out-of-court statement was admissible and the Confrontation Clause satisfied only if the witness was unavailable and the statement bears adequate "indicia of reliability."<sup>23</sup>

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("In all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face...."); N.H. CONST. pt. 1, art. 15 ("Every subject shall have a right ... to meet the witnesses against him face to face...."); OHIO CONST. art. I, § 10 ("In any trial, in any court, the party accused shall be allowed ... to meet the witnesses face to face...."); OR. CONST. art. I, § 11 ("In all criminal prosecutions, the accused shall have the right ... to meet the witnesses face to face...."); S.D. CONST. art. VI, § 7 ("In all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face...."); TENN. CONST. art. I, § 9 ("That in all criminal prosecutions, the accused hath the right ... to meet the witnesses face to face...."); WASH. CONST. art. I, § 22 ("In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face....").

<sup>12</sup> *Mattox v. United States*, 156 U.S. 237 (1895).

<sup>13</sup> *Id.* at 240.

<sup>14</sup> *Id.* at 242-43.

<sup>15</sup> *Id.* at 243.

<sup>16</sup> *Id.*

<sup>17</sup> *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

<sup>18</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>19</sup> *Roberts*, 448 U.S. at 66.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 59.

<sup>23</sup> *Id.* at 66.

*Crawford* changed the Confrontation Clause analysis.<sup>24</sup> The Court changed the second step of the analysis from "indicia of reliability" to "prior opportunity to cross-examine" the declarant. The analysis created by *Crawford* requires two things. First, the examination of any out-of-court to determine whether the statement is testimonial.<sup>25</sup> A statement is testimonial if the statement was "made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial."<sup>26</sup> Second, if the statement is determined to be testimonial, there must have been a prior opportunity for the defendant to have cross-examined the witness.<sup>27</sup> Stated another way, where the issue is testimonial evidence, the "Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."<sup>28</sup>

*Davis v. Washington* provided an exception or clarification to the meaning of "testimonial."<sup>29</sup> In response to the issue of whether an emergency 911 call was testimonial, the Court held that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."<sup>30</sup> The Court referred back to the *Crawford* decision in noting the perimeters of the Confrontation Clause: (1) a witness is someone who bears testimony, and (2) testimony is a "solemn declaration or affirmation" for the purpose of proving a fact.<sup>31</sup> Whether a statement is testimonial is an objective inquiry.<sup>32</sup> However, a statement that begins objectively to be for the primary purpose of an emergency may evolve into a statement with the primary purpose of future prosecution.<sup>33</sup>

Professor Michael Graham has described the current state of the Confrontation Clause by defining testimonial for Confrontation Clause purposes:

An out-of-court statement is 'testimonial' only if hearsay as defined in Fed. Rule Evid. 801(a)-(d) and the statement was made by, or made to, or elicited by a police officer, other law enforcement personnel, or a judicial officer under circumstances objectively indicating at the time made that the primary purpose to which the statement will be used by the government is to establish or prove past events potentially relevant to a later criminal prosecution.<sup>34</sup>

The Professor describes the current interpretation of the Confrontation Clause to be "theoretically unsound, inconsistent, confused, and illogical."<sup>35</sup>

The United States Supreme Court first considered the interplay between expert witnesses and the Confrontation Clause in *Melendez-Diaz v. Massachusetts*.<sup>36</sup> With the *Crawford* and *Davis* decisions behind them, the Court was now faced with a situation where affidavits reporting the substance and weight of a controlled substance were introduced in evidence and not through live testimony.<sup>37</sup> Justice Scalia, writing for the Court, held that "there is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements'" prohibited

<sup>24</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>25</sup> *Id.* at 51-52.

<sup>26</sup> *Id.* at 52.

<sup>27</sup> *Id.* at 53-54.

<sup>28</sup> *Id.* at 68.

<sup>29</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2006).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 823-24 (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

<sup>32</sup> *Id.* at 826.

<sup>33</sup> *Id.* at 828-29.

<sup>34</sup> Michael H. Graham, *Justice Scalia's Fundamentally Flawed Confrontation Clause Analysis Continues in Melendez-Diaz: It's Time to Begin All Over Again*, 45 Crim. L. Bull. 6 (2009).

<sup>35</sup> *Id.*

<sup>36</sup> *Melendez-Diaz*, 129 S.Ct. 2527, 2530-31 (2009).

<sup>37</sup> *Id.*

by the Confrontation Clause.<sup>38</sup> Under the objective analysis, a reasonable person would have believed that those affidavits would be available for use at a criminal trial.<sup>39</sup> The Court held that the statements were testimonial and that the analysts were "witnesses" for Confrontation Clause purposes.<sup>40</sup> Thus to be admissible against the defendant, the prosecution would have to show two things: that the witness was unavailable and that the defendant had been afforded a prior opportunity to cross-examine witnesses.<sup>41</sup>

Justice Scalia addressed six specific arguments that were made by the prosecution and/or by the defendant. First, the argument was made that the forensic analysts were not "accusatory" witnesses and therefore the Confrontation Clause did not apply.<sup>42</sup> The Court rejected this argument and held that there are two types of witnesses at trial and that are addressed in the constitution: first, there are witnesses against the defendant, for which the Confrontation Clause applies, and second, there are witnesses for the defendant, for which the compulsory process clause applies.<sup>43</sup>

Second, the argument was made that the analysts were not "conventional," "typical," or "ordinary" witnesses.<sup>44</sup> The argument goes that the conventional witness was recalling past events while the analysts were reporting on their contemporary observations.<sup>45</sup> Further the argument was made that the statements were not made in response to interrogation and therefore the Confrontation Clause did not apply.<sup>46</sup> The Court rejected all of these arguments stating that analysts were "witnesses" and that affidavits were testimonial.<sup>47</sup>

Third, the difference between recounting historical events and memorializing neutral scientific fact was cited as a reason why the Confrontation Clause should not apply to the analysts.<sup>48</sup> Justice Scalia called this reasoning nothing more than a call to return to the test for "particularized guarantees of trustworthiness" adopted in *Roberts* but later rejected in *Crawford*.<sup>49</sup> The Court held that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."<sup>50</sup> Confrontation is necessary because it cannot only discover the fraudulent analyst, but also ferret out the incompetent ones.<sup>51</sup>

Fourth, the analysts' affidavits were neither public records or business records admissible without confrontation.<sup>52</sup> While many documents may be admissible as public or business records, ones that are created specifically for use at this trial do not fall within those exceptions.<sup>53</sup> The documents are not primarily created for the use in the business or in the agency, but rather are primarily created for use in court.<sup>54</sup> The test for whether the Confrontation Clause applies to public or business records is whether they were "prepared specifically for use at [the defendant's] trial."<sup>55</sup>

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<sup>38</sup> *Id.* at 2532.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2533.

<sup>43</sup> *Id.* at 2534.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2535.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 2536.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 2538.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2540.



Fifth, it was argued that the defendant at trial could have subpoenaed the analysts. This argument was dealt short shrift when the Court indicated that it is the prosecution who has the burden of proof and the responsibility for calling witnesses.<sup>56</sup>

Sixth, and last, the argument was made that in an age where there are analysts and experts in almost every trial, the "necessities of trial and the adversary process," will simply cause the criminal justice system to collapse if the prosecution is required to call all of those witnesses.<sup>57</sup> Justice Scalia found that many jurisdictions were already complying with the dictates of *Crawford* and that the sky was not falling now or going to fall because the Confrontation Clause requires live testimony.<sup>58</sup>

### III. EXPERTS

Experts in the trial courts in America have a long history. As early as 1876, the United States Supreme Court was making the distinction between, on one hand, subjects that were a matter of common observation "upon which the lay or uneducated mind is capable of forming a judgment" and, on the other hand, questions that require an expert because "in such questions scientific men have superior knowledge."<sup>59</sup> The key requirement for experts was that their testimony would "assist the court or jury in reaching a correct conclusion."<sup>60</sup>

The focus for the fact-finder was always upon whether the facts underlying the opinion were true and proven at trial.<sup>61</sup> One way an expert could perceive the facts underlying his opinion was through personal observation. The party opposing the expert could cross-examine the witness concerning the expert's own personal knowledge of facts.

The expert could be asked hypothetical questions, but jurors were instructed to carefully look to the facts that supported the question and "[i]f the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight, because [they are] based upon false assumptions or [false] statements of facts."<sup>62</sup> "[T]he opinions of these experts depend very largely upon the truth of the hypothetical case that counsel on the one side and on the other have seen proper to put to the witnesses during their examination...."<sup>63</sup> Jurors were forewarned to "...be careful to ascertain what the evidence establishes as to the truth of the one or the other of these different hypothetical cases put by counsel to the witnesses on the examinations."<sup>64</sup> The jury was left to decide whether the facts assumed in a hypothetical question were both true and proven.<sup>65</sup>

Even now, some jurisdictions specifically instruct the jury that part of their decision making is determining the truth or falsity of the facts underlying an expert opinion.<sup>66</sup> The common law in

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Milwaukee & Saint Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 472-73 (1876).

<sup>60</sup> *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U.S. 612, 618 (1884).

<sup>61</sup> *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891).

<sup>62</sup> *Forsyth v. Doolittle*, 120 U.S. 73, 77 (1887).

<sup>63</sup> *Union Ins. Co. v. Smith*, 124 U.S. 405, 414 (1888).

<sup>64</sup> *Id.* at 415.

<sup>65</sup> *Gottlieb v. Hartman*, 3 Colo. 53, 63 (Colo. Terr. 1876) (citing *Carpenter v. Blake*, 75 N.Y. 12 (N.Y. 1878)).

<sup>66</sup> See, e.g., JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (CACI) 220 (2003), ("In determining the weight to give to the expert's opinion that is based on the assumed facts, you should consider whether the assumed facts are true."); CALIFORNIA JURY INSTRUCTIONS – CRIMINAL (CALJIC) 2.82 (2005), in pertinent part, (1)† is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts.

CALIFORNIA JURY INSTRUCTIONS, CIVIL: BOOK OF APPROVED JURY INSTRUCTIONS, BAJI 2.42 (2003), ("It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved."); ALABAMA PATTERN JURY INSTRUCTIONS CIVIL, APJI 15.08, ("(f)irst examine carefully all the material facts stated in the

the United States required the ability to test the expert opinion: an expert's personal observations would be subject to cross-examination, and if the expert was asked a hypothetical question, those underlying facts were subject to being proven at trial through some other method, usually witness testimony, and that testimony was subject to cross-examination.

Up to this point in the development of the utilization of experts at trial, jurors had the ability to make credibility determinations based upon the cross-examination of a live witness: either the expert himself or some other witness that testified to the underlying facts. Somewhere along the development of expert testimony, the notion that the underlying facts had to be proven as substantive evidence got lost.

Under the Federal Rules, expert analysis can be said to include eight considerations:

1. relevance<sup>67</sup>
2. assist (fit)<sup>68</sup>
3. qualified expert<sup>69</sup>
4. sufficient facts or data<sup>70</sup>
5. reliable principles and methods<sup>71</sup>
6. reliable application<sup>72</sup>
7. appropriate basis for the opinion, introduced at the appropriate time<sup>73</sup>
8. opinion on ultimate issue<sup>74</sup>

The trial court should consider each of these steps in turn before admitting expert testimony. Occasionally, trial courts have permitted an expert to discuss reliable principles and methods

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hypothetical questions and be reasonably satisfied that they have substantially been proved to be true."); and, for example, CALIFORNIA JURY INSTRUCTIONS - CRIMINAL (CALJIC) 2.8 (2010), in pertinent part,

An expert witness is permitted to consider statements made to the witness or a third person that have not been made under oath in court. Statements considered by an expert witness which were made to the witness or a third person do not prove that what was said was true. The truth of those statements may come from other evidence. You should consider the failure to prove in court that it was made or is true in determining what weight to give to the opinion of the expert.

NEW JERSEY MODEL CIVIL JURY CHARGES 1.13(A) (1995), ("You must determine if any fact assumed by the witness has not been proved and the effect of that omission, if any, upon the weight of the expert's opinion."); NEW MEXICO UNIFORM JURY INSTRUCTIONS—CRIMINAL, (UJI) 14-5051 (2010),

You must find all the evidence whether or not the assumed facts have been proved. If you should find that any assumption has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS, 4.10(B) (2001),

The value of an opinion given in response to a hypothetical question depends on various things, including how close the assumptions made are to the true facts. One of your tasks, as jurors, is to determine from all the evidence, whether or not the [facts] [testimony] assumed for a hypothetical question [have been] [has been] proven to be true. If you find that any of the assumed [facts have] [testimony has] not been proven, you should determine how that affects the value and weight of the expert witness's opinion.

<sup>67</sup> FED. R. EVID. 401, 401.

<sup>68</sup> FED. R. EVID. 702.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> FED. R. EVID. 703, 705.

<sup>74</sup> FED. R. EVID. 704.

without testifying to the application and/or express an opinion in the particular case.<sup>75</sup> Expert testimony, of course, is subject to Fed. Rule Evid. 403 considerations as well.<sup>76</sup>

The adoption of the Federal Rules of Evidence codified the move from the underlying facts having to be proven to a principle that as long as the facts were "reasonably relied upon by experts in the field in forming opinions or inferences" the facts were admissible. Currently, expert testimony in the Federal courts is governed by the Federal Rules of Evidence, Rules 702 through 706. Rule 703 concerning the bases of an expert's opinion states, in pertinent part:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.<sup>77</sup>

Many states adopted this precise language and continue to utilize it in their statute or rules of evidence.<sup>78</sup>

Some courts have interpreted the second sentence of the Rule as not only permitting the opinion to be based upon facts or data "reasonably relied upon by experts" in the field, but also permitting the expert to testify to facts or data that are not admissible.<sup>79</sup> A competing interpretation is that while the expert could rely upon information that was otherwise inadmissible, that evidence could not be revealed by the expert on direct examination.<sup>80</sup> The

<sup>75</sup> See, e.g., *United States v. Smead*, 317 Fed. Appx. 457, 464-65 (6th Cir. 2008) (excluding expert testimony in part); *United States v. Smithers*, 212 F.3d 306, 311-12, 314 (6th Cir. 2000) (reciting historical use of eyewitness expert testimony and indicating that the expert testimony could be offered on the subject of psychological factors which influence memory).

<sup>76</sup> See, e.g., *United States v. Mathis*, 264 F.3d 321, 338 (3d Cir. 2001) (holding that after the Rule 702 analysis the court turns to a Rule 403 evaluation).

<sup>77</sup> FED. R. EVID. 703.

<sup>78</sup> ALASKA. R. EVID. 703; IOWA. R. EVID. 5.703; LA. CODE EVID. ART.703; ME. R. EVID. 703; MONT. CODE. ANN. 703; NEV. REV. STAT., 50.285; N.H. R.EVID. 703; N.J. R. EVID. 703; N.C. GEN. STAT. G.S. §8C-1, RULE 702; OR. REV. STAT., §40.415, RULE 703; PA. R. EVID. 703; S.D. CODIFIED LAWS, § 19-15-3, RULE 703; TEX. R. EVID. 703; WASH. R. EVID. 703; W. VA. R. EVID. 703.

<sup>79</sup> *United States v. Pablo*, No. 09-2091, 2010 WL 4609188 (10<sup>th</sup> Cir. Nov. 6, 2010)

(t)herefore, where an expert witness discloses otherwise inadmissible out-of-court testimonial statements on which she based her opinion, the admission of those testimonial statements under Rule 703 typically will not implicate a defendant's confrontation rights because the statements are not admitted for their substantive truth.

*People v. Leach*, No. 1-07-1448, 2010 WL 4629056 (Ill.App. Nov. 12, 2010) (holding that "while the contents of reports and records relied upon by experts may be disclosed, an expert may also testify as to nontestifying experts' findings and conclusions."); *Foster v. State*, No. 49A04-0908-CR-435.930, 2010 WL 2983133 (Ind.App. 2010) (holding that the underlying basis may be disclosed under a three-part test: first, sufficient expertise; second, "the report is of the type normally found reliable," and third, the information is customarily relied upon by experts in the field."); *Gardner v. United States*, 999 A.2d 55, 59-60 (D.C. 2010) (permitting the hearsay underlying basis as long as a limiting instruction is given); *Miller v. State*, No. CR 08-1297 2010 WL 129708 (Ark. Jan. 7, 2010) (holding that the underlying basis for an expert opinion was hearsay, the evidence was allowed to be presented on direct because it was "critical in rendering a forensic evaluation"); *State v. Lui*, 221 P.3d 948, 957-58 (Wash. Ct. App. 2009) (holding that "the trial court (has) discretion to permit an expert to relate hearsay or otherwise inadmissible evidence to the jury for the limited purpose of explaining the reasons for his or her opinion."); *People v. Rutterschmidt*, 98 Cal.Rptr.3d 390, 413 (Cal. Ct. App. 2009) (holding "an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion."); *People v. Leach*, 908 N.E.2d 120, 131 (Ill. App. Ct. 2009) (holding that admissible facts, including another expert's findings and conclusion for the limited purpose of explaining the basis for an expert opinion).

<sup>80</sup> *United States v. Williams*, No. 09-0026, 2010 WL 4071538 (D.C. Oct. 18, 2010) (holding that the a forensic pathologist could use another pathologist's autopsy report as a basis for his opinion, that basis could not be revealed on direct examination); *Commonwealth v. Barbosa*, 933 N.E.2d 93, 106 (Mass. 2010) (permitting an expert to base his opinion on testimonial evidence from non-testifying witnesses, but prohibiting

question arose whether Rule 703 then became another hearsay exception or an unwritten method for circumventing hearsay. Some courts attempt to get around this interpretation by holding that the evidence was admissible only as it went to the basis of the expert's opinion, and, therefore, was not being admitted for its truth. But if the underlying facts and data are not true, the expert's opinion would be irrelevant and subject to a Rule 403 exclusion.

In criminal cases, these questions implicate the Confrontation Clause. Under the common law of evidence, the Confrontation Clause was not an issue because the expert was required to have personal knowledge that could be tested by cross-examination. Alternatively, the expert could be asked a hypothetical question and the facts contained in the question were subject to proof at trial. The expansion of the basis for the expert opinion to include other evidence "of a type reasonably relied upon by experts in the field"<sup>81</sup> opened the floodgates to uncontroverted evidence.<sup>82</sup>

The Supreme Court sought to control the flood of uncontroverted facts by the 2000 Amendment to Fed. Rule Evid. 403. The amendment added a sentence to the rule:

Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.<sup>83</sup>

Several states adopted the new balancing test into their statutes or court rules of evidence.<sup>84</sup>

The comments to the rule indicate the limited purpose of the "otherwise inadmissible" facts or data.<sup>85</sup> The comment warns that the jury must be instructed that the basis for the opinion is not admissible as substantive evidence (i.e., for its truth) but rather only as the basis of the opinion.<sup>86</sup>

Looked at from another angle, in order for the facts or data to support an opinion, the facts or data must be true, or there must at least be a good-faith argument that the matters are true. One problem arises when an expert testifies to the testing that another expert performed: the basis is assumed to be true and there is no opportunity to cross-examine the original expert, the "man behind the curtain."

Under the Rule, the expert may use any evidence that is "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."<sup>87</sup> Those facts "need not be admissible," but if they are "otherwise inadmissible," the proponent is not permitted to ask the expert on direct examination, and the expert is not permitted to disclose them to the jury, unless a special balancing test is met.<sup>88</sup> That balancing test is whether the

disclosure except on cross-examination); *United States v. Gray*, No. 3:09 CR 182, 2010 WL 3515599 (N.D. Ohio, Sept. 3, 2010) (experts may use the testimonial statements of non-testifying witnesses as the basis of the opinion, but may not reveal them on direct examination); *Martinez v. State*, 311 S.W.3d 104 (Tex. Crim. App. 2010) (holding that disclosure of information from non-testifying pathologist's autopsy report was a violation of confrontation, but that the expert could use it as an undisclosed basis for his opinion).

<sup>81</sup> FED. R. EVID. 703.

<sup>82</sup> *But see* MICH. R. EVID. 703

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

<sup>83</sup> FED. R. EVID. 703.

<sup>84</sup> ARIZ. R. EVID. 703; COLO. R. EVID. 703; N.D. R. EVID. 703; OKLA. ST. ANN. §2703; UTAH. R. EVID. 703.

<sup>85</sup> FED. R. EVID. 703 advisory committee notes (amended 2000).

<sup>86</sup> *Id.*

<sup>87</sup> FED. R. EVID. 703

<sup>88</sup> *Id.*

"probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."<sup>89</sup>

Prior to the amendment, courts and commentators had reached different conclusions on how to treat this information. "The amendment provides a presumption against disclosure to the jury of information used as the basis for an expert's opinion and not admissible for any substantive purpose, when the information is offered by the proponent of the expert."<sup>90</sup>

The underlying basis for the opinion can be "otherwise inadmissible" for any number of reasons. For example and pertinent here, although overlooked by the cases, the underlying basis may not be admissible because its admission might violate the defendant's right to confront the witnesses against him. The Wisconsin Supreme Court had this to say about disclosure of the bases for expert opinions: "(T)he thorny question of what to do with inadmissible evidence that experts rely upon as a basis for an opinion is one that has proved difficult to answer with a fair and workable rule."<sup>91</sup>

Some courts indicate that the underlying basis is not being admitted for its truth, but rather as the underlying basis of the opinion.<sup>92</sup> For example, the Tenth Circuit in *United States v. Pablo*<sup>93</sup> held that a defendant's right to confrontation usually would not be implicated where the expert uses, as the basis of his own opinion, otherwise inadmissible out-of-court testimonial statements.<sup>94</sup> The type and quantity of testimonial testimony permitted, however, is a question of degree.<sup>95</sup> The expert cannot testify as a mere conduit of the non-testifying expert's knowledge and opinion because the purpose for introducing the evidence is for its truth and, therefore, a Confrontation Clause violation.<sup>96</sup> However, if the expert has formed his own opinion based upon the non-testifying expert's report, introduction of the report is for the factfinder to be able to test the underlying basis for the opinion, and, therefore, it does not violate the Confrontation Clause.<sup>97</sup>

In *Pablo*, one expert was permitted to testify to statements contained in another expert's DNA report and to a third expert's serology report.<sup>98</sup> The defendant complained that his right to confront the other experts had been violated by the introduction of the evidence of the two non-testifying experts because the testifying witness was a mere conduit. The trial court, under the Tenth Circuit's reasoning, was then required to determine whether the testifying expert was merely a conduit for the other expert's reports or whether the expert had formed her own opinion and, therefore, was only using the other expert's reports as the basis for her own opinion.<sup>99</sup> The Tenth Circuit avoided resolving the underlying issue by finding there was no plain error.<sup>100</sup> The Court also noted that *Melendez-Diaz* did not clearly resolve the issue.

The degree to which an expert may merely rely upon, and reference during her in-court testimony, the out-of-court testimonial conclusions of another person not called as a

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<sup>89</sup> *Id.*

<sup>90</sup> 2000 Amendment Commentary, *construed* in FED. R. EVID 703.

<sup>91</sup> *Wisconsin v. Fischer*, 322 N.W.2d 629, 637 (Wis. 2010).

<sup>92</sup> *Gardner v. United States*, 999 A.2d 55, 59-60 (D.C. 2010); *Marshall v. Oklahoma*, 232 P.3d 467, 474-75 (Okla. Crim. App. 2010); *New Mexico v. Bullcoming*, 226 P.3d 1 (N.M. 2010); *Washington v. Lui*, 221 P.3d 948, 957 (Wash. App. 2009) (holding that "to the extent the experts here related testimonial hearsay statements to the jury, they did so to explain the bases for their opinions."); *Wood v. Texas*, 299 S.W.3d 200, 213 (Tex. Crim. App. 2009); *California v. Nguyen*, No. H026581, 2005 WL 2064165 (Cal. Ct. App. Aug. 29, 2005).

<sup>93</sup> *United States v. Pablo*, No. 09-2091, 2010 WL 4609188 (10<sup>th</sup> Cir. Nov. 6, 2010).

<sup>94</sup> *Id.* at 4.

<sup>95</sup> *Id.* at 5.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 7-8.

witness is a nuanced legal issue without clearly established bright line parameters. Even today with the benefit of *Melendez-Diaz*.<sup>101</sup>

This reasoning skips steps in evidentiary analysis and has the basic flaw that the expert, the court, and the jurors assume that the underlying basis is true. If it is not true, then the underlying bases would be inadmissible because they are not relevant. While there certainly can be matters of fact that may be true or not true under a good faith analysis, the decision of whether the facts are true is a chore for the factfinder and should not be left to the expert's discretion. Often the testifying expert will not have sufficient personal knowledge of the facts when he is testifying based on someone else's report and, therefore, not have a sufficient basis for a valid exploration into the facts through cross-examination by the defense. Criminal defendants claim it is those underlying facts that they have a right to confront.

#### IV. POINT OF VIEW

Justice Scalia in *Crawford* adopted the following standard for testimonial statements: "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."<sup>102</sup> The only authority for the citation was a National Association of Criminal Defense Lawyers and American Civil Liberties Union amicus brief.<sup>103</sup> The brief itself sets out a standard only in two places, in the introduction<sup>104</sup> and in the argument without any authority cited.<sup>105</sup> In fact, Justice Scalia adopted only the first statement of the proposed rule, while the second recitation stated, "an out-of-court statement is testimonial only when the circumstances indicate that a reasonable declarant at the time would understand that the statement would later be available for use at a criminal trial." While Justice Scalia adopted the standard, the standard's reference to an "objective witness" has no firm roots in legal precedent. Notwithstanding its lack of an firm foundation, Justice Scalia reiterated the standard in *Melendez-Diaz*.<sup>106</sup>

This standard simply does not work. Any witness, lay or expert, after rational reflection, would believe that any statement made to the government could be used in a later prosecution. The pathologist who performs an autopsy at the request of law enforcement knows that the report could be used in a later prosecution. The analyst who tests drugs would know that the report could be used in a later prosecution. The clerk who prepares an affidavit of no record after a diligent search knows that the affidavit could be used in a later prosecution. The manufacturer who prepares blood alcohol test kits reasonably knows that the evidence could be used in a later prosecution. To go to the extreme, manufacturers of blood alcohol testing machines well know that those machines will be used for blood alcohol testing and that any statements made by individuals in the manufacturing and testing of the machine could be used in a later prosecution.

If the Confrontation Clause is going to be interpreted not to require live testimony from every witness, a position the United States Supreme Court has long taken,<sup>107</sup> a more workable line needs to be drawn than the point of view of an "objective witness." The Sixth amendment guarantees that it is the "accused" who "shall enjoy the right" to be confronted with the witnesses.<sup>108</sup> It is the defendant's right and the focus should not be taken from the defendant

<sup>101</sup> *Id.* at 7.

<sup>102</sup> *Crawford v. Washington*, 541 U.S. 36, 52 (2010).

<sup>103</sup> Brief for the National Association of Criminal Defense Lawyers ("NACDL") and the American Civil Liberties Union, *Crawford v. Washington*, 541 U.S. 36, (2003) (No. 02-9410), 2003 WL 21754961.

<sup>104</sup> *Crawford*, 541 U.S. at 52.

<sup>105</sup> *Id.* at 22.

<sup>106</sup> *Melendez-Diaz v. Massachusetts*, 129 U.S. 2527, 2527 (2009).

<sup>107</sup> See *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

<sup>108</sup> U.S. CONST. amend. VI.

and placed upon some "objective witness." However, line drawing must take into consideration not only the defendant's right to confrontation, but also the efficacy of cross-examination. The defendant certainly may benefit from the cross-examination of the pathologist or the drug analyst. The defendant can gain little, if any, benefit from the appearance and cross-examination of a clerk who found no record, or the manufacturer who prepared the blood alcohol test kits, or the manufacturer of the blood alcohol testing machine.

Therefore, the point of view should be from a hypothetical reasonable defendant, not the "objective witness." The question should not be whether the objective witness understands that the statement could be used at a criminal trial, but rather whether a reasonable defendant could benefit from cross-examination.

## V. IS SOMEONE – ANYONE – TO CROSS-EXAMINE SUFFICIENT?

There is a split of authority on whether it sufficient for someone – anyone – who is an expert to be put on the witness stand so he can be cross-examined on the work and analysis done by other experts. If there is any expert witness to examine, some courts have held that is sufficient to admit the non-testifying expert's opinion or report as the underlying basis for the expert opinion.<sup>109</sup> This rationale skirts both a hearsay analysis and a confrontation analysis.

After the decision in *Melendez-Diaz*, the United States Supreme Court denied certiorari in *Pendergrass v. Indiana*, a case where one expert was called to testify to the procedures and results produced by another expert.<sup>110</sup> Pendergrass was charged with inappropriately touching his thirteen year old daughter based, in part, on DNA testing.<sup>111</sup> The DNA analyst, Daun Powers, was not called as a witness at trial.<sup>112</sup> Two exhibits were admitted that had been prepared by Powers: an exhibit labeled "certificate of analysis" and an exhibit labeled "profiles for paternity analysis."<sup>113</sup> The "certificate of analysis" enumerated the evidence submitted to the laboratory, a list of tests performed, and a certification of where the test results were sent.<sup>114</sup> The "profiles"

<sup>109</sup> See *United States v. Turner*, 591 F.3d 928, 932-33 (7th Cir. 2010) (holding no confrontation clause violation for admitting expert's testimony based on underlying forensic testing of cocaine); *United States v. Williams*, No. 09-0026 (PLF), 2010 WL 4071538, at\*4-5 (D.D.C. Oct. 18, 2010) (denying admission of underlying report serving as basis of expert's opinion); *United States v. Mirabal*, No. CR 09-3207 JB, 2010 U.S. Dist LEXIS 91595 at \*11-13 (D.N.M. Aug. 7, 2010) (admitting expert testimony based on forensic chemical testing but not allowing expert to testify to unavailable expert's conclusions); *People v. Zayas*, No. E048865, 2010 WL 3530426, at 1-2, 4 (Cal. Ct. App. Sept. 13, 2010) (admitting discussion of underlying forensic drug analysis at trial); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029-30 (Mass. 2009) (holding expert could testify to opinions based on autopsy report but not direct findings of the report); *State v. Mitchell*, 4 A.3d 478, 490 (Me. 2010) (holding no confrontation clause violation for admitting expert's testimony based on underlying report); *State v. Dilboy*, 999 A. 2d. 1092, 1104 (N.H. 2010) (holding no confrontation clause violation for admitting expert's testimony based on underlying report); *State v. Bullcoming*, 2010 NMSC 007, 226 P.3d 1, 8-9 (N.M. 2010) (admitting expert testimony based on underlying forensic testing for alcohol in blood), cert. granted, *Bullcoming v. New Mexico*, No. 09-10876, 2010 WL 2008002 (U.S. Sept. 28, 2010); *State v. Hough*, 690 S.E.2d 285, 290-91 (N.C. Ct. App. 2010) (holding no confrontation clause violation by expert stating opinion based on underlying reports); *Wood v. State*, 299 S.W.3d 200, 213 (Tex. App. 2009) (holding no confrontation clause violation when expert gave opinion based on underlying autopsy reports, but a confrontation clause violation did occur when autopsy report findings were disclosed). But See *People v. Dendel*, No. 247391, 2010 WL 3385552 (Mich. Ct. App. Aug. 24, 2010) (holding a confrontation clause violation by allowing expert opinion based on inadmissible underlying report).

<sup>110</sup> *Pendergrass v. Indiana*, 913 N.E.2d 703 (Ind. 2009), cert. denied, *Pendergrass v. Indiana*, 130 S.Ct. 3409 (2010).

<sup>111</sup> *Pendergrass*, 913 N.E.2d at 704.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

document contained numbers in columns categorized by abbreviated test labels for each of the three test subjects: Pendergrass, the daughter, and the fetus.<sup>115</sup>

The State did call two witnesses concerning the DNA evidence. Lisa Black, a supervisor at the laboratory, explained the process of test sampling.<sup>116</sup> She testified that she performed technical, administrative, and random reviews of work performed by the DNA analysts.<sup>117</sup> She did a "technical review" of Power's work in this case.<sup>118</sup> She relied on Power's notes to testify about the procedures that were followed in this particular case.<sup>119</sup> Dr. Michael Conneally, a DNA expert and the only other live expert witness to testify at trial, explained his conclusions and how he applied the DNA principles.<sup>120</sup> This witness created a paternity index table to calculate the probability of fatherhood of the fetus based upon the laboratory's test results.<sup>121</sup>

The Indiana Supreme Court found no confrontation violation.<sup>122</sup> The Court found that Black, the laboratory supervisor, "did have a direct part in the process by personally checking Power's test results."<sup>123</sup> The fact that she looked at the results and could testify about standard operating procedures were sufficient for the Court to find that there was no confrontation violation.<sup>124</sup> "Here, the prosecution supplied a supervisor with direct involvement in the laboratory's technical processes and the expert who concluded that those processes demonstrate" the defendant was the father.<sup>125</sup> The Court concluded that "this sufficed for Sixth Amendment purposes."<sup>126</sup>

The Court further found that although the exhibits might be inadmissible hearsay, "opinions by qualified experts" "may rely on information supplied by other persons" "even if the supplier is not present to testify in court."<sup>127</sup> The Court stated that the evidence relied upon by the experts who did testify "might have been subject to a limiting instruction," but that it was not error to admit them.<sup>128</sup>

The Court seemed to be creating some type of exception for experts. However, any such exception must take into account not only the Rules of Evidence as they relate to experts, but also confrontation guaranteed by the Constitution. The dissent pointed out,

[the analyst who actually performed the test was] never subject to the rigors of cross-examination on either the examination she performed, the testing she conducted, or the results she reached.... Although a supervisor might be able to testify to her charge's general competence or honesty, this is no substitute for a jury's first-hand observations of the analyst that performs a given procedure; and a supervisor's initials are no substitute for an analyst's opportunity to carefully consider, under oath, the veracity of her results.<sup>129</sup>

Since 2007, the courts in California since 2007 have been guided by the California Supreme Court's decision in *People v. Geier*.<sup>130</sup> The California case in *Geier* was decided post-

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 705.

<sup>120</sup> *Id.* at 704.

<sup>121</sup> *Id.* at 705.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 707.

<sup>124</sup> *Id.* at 707-08.

<sup>125</sup> *Id.* at 708.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 708-09.

<sup>128</sup> *Id.* at 709.

<sup>129</sup> *Id.* at 710-11 (Rucker, J. dissenting).

<sup>130</sup> *California v. Geier*, 161 P.3d 104 (Cal. 2007), cert. denied, *Geier v. California*, 129 S.Ct. 2856 (2009).

Interestingly, the denial of certiorari in *Geier* occurred on June 29, 2009, the *Melendez-Diaz* opinion issued June 25, 2009. Before the *Geier* decision, the California appellate courts had held that autopsy reports



*Crawford*, but pre-*Melendez-Diaz*. Certiorari was denied by the United States Supreme Court only four days after issuing *Melendez-Diaz*.

In *Geier*, the DNA analysis was performed by Paula Yates, a biologist.<sup>131</sup> However, the prosecution chose to only call Dr. Robin Cotton, a DNA expert.<sup>132</sup> Dr. Cotton had "reviewed the forms" Yates had filled out and Yates handwritten notes, as well as other data in the case.<sup>133</sup> The defendant objected based upon his right to confront the person who actually did the analysis, Yates.<sup>134</sup> After reviewing *Crawford* and the multitude of cases after *Crawford*, interpreting what is testimonial, the California Court held that "we are nonetheless more persuaded by those cases concluding that such evidence is not testimonial..."<sup>135</sup> The Court held that *Crawford* and post-*Crawford* opinions required an analysis to determine whether a statement was testimonial based on three conditions: (1) it is made to law enforcement, (2) it describes a past fact related to criminal activity, and (3) it was made for possible use at a later trial.<sup>136</sup>

The Court found that "the crucial point is whether the statement represents the contemporaneous recordation of observable events."<sup>137</sup> Because Yates' information as recorded in her report and notes were made as part of an objective and standardized scientific protocol, they were not made to incriminate the defendant, but as part of Yates' employment as an objective observer.<sup>138</sup> The analyst's records were properly received in evidence because the testing took place in a "routine, non-adversarial process meant to ensure accurate analysis."<sup>139</sup> The California Supreme Court thus held that there were two requirements in overcoming a confrontation issue: first, there must be live testimony from some expert and an opportunity to cross examine that expert, and second, the report must be a "contemporaneous recordation of observable events."<sup>140</sup> The Court thus created a someone-anyone exception to Confrontation.

The *Geier* analysis, even after *Melendez-Diaz*, has been utilized by the vast majority of California cases in addressing such areas as DNA,<sup>141</sup> autopsies,<sup>142</sup> blood alcohol testing<sup>143</sup> and drug testing.<sup>144</sup> However, a minority of California Courts of Appeal have held that the *Geier* analysis was overruled by the *Melendez-Diaz* case.<sup>145</sup> Both the Indiana Supreme Court in

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were admissible either as business records, *California v. Beeler*, 891 P.2d 153, 167-70 (Cal. 1995), or as public records, *California v. Williams*, 345 P.2d. 47,64 (Cal. Ct. App. 1959).

<sup>131</sup> *Geier*, 161 P.3d at 132.

<sup>132</sup> *Id.* at 131.

<sup>133</sup> *Id.* at 132.

<sup>134</sup> *Id.* at 133.

<sup>135</sup> *Id.* at 138.

<sup>136</sup> *Id.* at 138-39.

<sup>137</sup> *Id.* at 140.

<sup>138</sup> *Id.* (quoting *People v. Brown*, 801 N.Y.S.2d 709, 712 (N.Y. Sup. Ct. 2005)).

<sup>139</sup> *Id.*

<sup>140</sup> *California v. Geier*, 161 P.3d 104, 140 (Cal. 2007).

<sup>141</sup> *People v. Suen*, 2010 WL 4401796 (Cal.App. 2010) (DNA); *People v. Reed*, 2010 WL 4324384 (Cal.App. 2010) (DNA) *People v. Blueford*, 2010 WL 3932799 (Cal.App. 2010) (DNA).

<sup>142</sup> See *California v. Suen*, No. B208155, 2010 WL 4401796, at \*7-8 (Cal. Ct. App. Nov. 8, 2010) (DNA); *California v. Reed*, No. B216570, 2010 WL 4324384, at \*10-13 (Cal. Ct. App. Nov 3, 2010) (DNA); *California v. Blueford*, No. B214908, 2010 WL 3932799, at \*12-13 (Cal. Ct. App. Oct. 8, 2010) (DNA).

<sup>143</sup> See *California v. McKiernan*, No. D055374, 2010 WL 3609173, at \*5 (Cal. Ct. App. Sept. 17, 2010) (blood alcohol testing).

<sup>144</sup> See *California v. Zayas*, No. E048865, 2010 WL 3530426, at \*1-5 (Cal. Ct. App. Sept. 13, 2010) (drug testing); *California v. Bingley*, No. B205609, 2009 WL 3595261, at \*4-6 (Cal. Ct. App. Nov. 3, 2009) (drug testing, distinguishing *Melendez-Diaz* on ground that in *Melendez-Diaz* there was no live testimony at all and therefore no opportunity to cross-examine and that the results of drug testing "constitutes a contemporaneous recordation of observable events").

<sup>145</sup> See *California v. Horn*, No. SCD184821, 2010 WL 1138836, at \*5 (Cal. Ct. App. Mar. 26, 2010) (DNA testing where the witness was a "reviewing criminalist," not the person who had performed the analysis); *California v. Dongo*, 98 Cal. Rptr. 3d. 702, 710-12 (Cal. Ct. Ap. 2009) (pathologist relied exclusively on autopsy report

*Pendergrass* and the California Supreme Court in *Geier* suggest, if not outright hold, that the underlying basis of an expert opinion does not have to undergo the crucible of truth-testing that is cross-examination. The Courts seem to have taken a wrong turn into at least an evidentiary presumption that the underlying basis of the expert opinion does not have to be true to be admissible.

Can the defendant's Confrontation Clause right be protected by an adequate cross-examination conducted of the experts in *Pendergrass* or *Geier*? Certainly the experts who testify can testify on how certain procedures should be performed, but their testimony assumes the truth of the reports underlying the factual basis. It would not be permissible for a lay person to testify from the report of another lay person without doing the hearsay and confrontation analysis. The "someone – anyone" analysis would never satisfy defendant's right to confront when considering lay witnesses. Why then should it be permissible to have an expert witness testify from the report of another technician, analyst, or expert?

The California Supreme Court granted certiorari in *People v. Dungo* to review the use of the *Geier* holding.<sup>146</sup> The California Court of Appeals in *Dungo* held that the autopsy report in that case was testimonial and that relying upon its contents violated the defendant's confrontation rights.<sup>147</sup> The pathologist who performed the autopsy did not testify at trial.<sup>148</sup> The prosecution called the employer of the pathologist, himself a pathologist, to testify.<sup>149</sup> The employer-pathologist was not present at the autopsy and relied exclusively on his employee's report and photographs of the autopsy to form his independent opinions regarding the cause of death.<sup>150</sup> During his testimony, the expert was permitted to disclose parts of the autopsy report from the other expert.<sup>151</sup> The trial court had held that there was no confrontation issue because "experts can rely on hearsay to help form their opinions."<sup>152</sup> Further, the otherwise inadmissible information was not being introduced "for the truth of the matter, that's just what he based his opinion on."<sup>153</sup>

The Court of Appeals first found that the autopsy report was testimonial.<sup>154</sup> In finding the report testimonial, the Court considered the facts of the statutory purpose for the report (circumstances, manner, and cause of death), the statutory duty to put the report in writing, the requirement of immediate notification of law enforcement, and the fact that the report was made during the course of a homicide investigation.<sup>155</sup> The Court found "the primary purpose... of the report was to establish or prove some past fact...."<sup>156</sup>

Concerning the use of the autopsy report at trial, the prosecution argued that the report did not violate either hearsay rules or the Confrontation Clause because the information was not introduced for its truth but rather as the basis of the opinion.<sup>157</sup> The Court found that the report

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prepared by a different pathologist); *California v. Lopez*, 98 Cal. Rptr. 3d 825, 827 (Cal. Ct. Ap. 2009) (criminalist supervisor testified about blood alcohol determined by an analyst).

<sup>146</sup> *California v. Dungo*, 102 Cal.Rptr.3d 282 (Cal. 2009) (granting certiorari on the following issues: (1) "Was defendant denied his right of confrontation under the Sixth Amendment when one forensic pathologist testified to the manner and cause of death in a murder case based upon an autopsy report prepared by another pathologist?" (2) "How does the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) affect this court's decision in *California v. Geier*, 161 P.3d 104 (Cal. 2007).").

<sup>147</sup> *Dungo*, 98 Cal. Rptr. 3d at 710-11.

<sup>148</sup> *Id.* at 706.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 708.

<sup>152</sup> *Id.* at 707.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 710.

<sup>155</sup> *Id.* at 710-11.

<sup>156</sup> *Id.* at 711.

<sup>157</sup> *Id.* at 712.

was "formally prepared in anticipation of a prosecution," in rejecting the prosecution's arguments.<sup>158</sup> In its charge to the jury, the trial court had instructed in pertinent part that "[y]ou must decide whether information on which the expert relied was true and accurate."<sup>159</sup> The jury was thus required to determine whether the underlying autopsy report was true. "In other words, the truth and accuracy of Dr. Lawrence's opinions was entirely dependent upon the accuracy and substantive content of Dr. Bolduc's report."<sup>160</sup> The Confrontation Clause, the Court continued, is only satisfied when the defendant has an opportunity to cross-examine the person who made the personal observations, not a different expert.<sup>161</sup> After finding a confrontation violation, the Court also found that introduction of the evidence was not harmless.<sup>162</sup>

## VI. JUSTICE THOMAS' VIEW OF THE CONFRONTATION CLAUSE

Justice Thomas authored a concurrence in *Melendez-Diaz*.<sup>163</sup> Although short, his opinion is the controlling opinion because it was necessary to create the decision for the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"<sup>164</sup>

Justice Thomas continued to state his position that there is only a Confrontation Clause violation if the out-of-court statements were "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."<sup>165</sup> Because *Melendez-Diaz* involved the admission of certificates stating the results of forensic analysis concerning the weight and substance and because they were sworn to before a notary public,<sup>166</sup> Justice Thomas found these certificates to "fall within the core class of testimonial statements" that violate the Confrontation Clause.<sup>167</sup> Some courts have adopted this interpretation to permit documents, such as autopsy reports, to be admitted into evidence because they are not "affidavits, depositions, prior testimony, or confessions."<sup>168</sup>

In *White v. Illinois*, Justice Thomas first stated his position that while hearsay and confrontation were evolving common-law principles, each protected a different interest.<sup>169</sup> The

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 713.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 713-14.

<sup>162</sup> *Id.* 714-15

<sup>163</sup> *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2543 (2009) (Thomas, J., concurring).

<sup>164</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

<sup>165</sup> *Melendez-Diaz*, 129 S.Ct. at 2543 (2009) (Thomas, J., concurring) (citing his concurring opinion in *White v. Illinois*, 502 U.S. 346, 365 (1992)).

<sup>166</sup> *Melendez-Diaz*, 129 S.Ct. at 2531.

<sup>167</sup> *Id.* at 2543 (Thomas, J., concurring).

<sup>168</sup> See *Larkin v. Yates*, No. CV09-2034-DSF(CT), 2009 WL 2049991, at \*7-8 (C.D. Cal. July 9, 2009) (holding DNA report not testimonial); *California v. Thompson*, No. C061568, 2010 WL 4493478, at \*8 (Cal. Ct. App. Nov. 10, 2010) (holding pathologist's report a government record but not testimonial); *California v. Zayas*, No. E048865, 2010 WL 3530426, at \*2 (Cal. Ct. App. Sept. 13, 2010) (holding forensic drug analysis not testimonial); *California v. Hernandez*, No. F057090, 2010 WL 3506888, at \*16 (Cal. Ct. App. Sept. 8, 2010); *California v. Miller*, 114 Cal.Rptr.3d 629, 637 (Cal. Ct. App. Aug 20, 2010) (holding DNA report not testimonial); *Illinois v. Johnson*, 915 N.E.2d 845, 853-54 (Ill. App. Ct. 2009) (holding DNA report not testimonial); *Maine v. Mitchell*, 4 A.3d 478, 490 (Me. 2010) (autopsy report would not be testimonial under *Melendez-Diaz*). But see *California v. Lopez-Garcia*, No. B215308, 2010 WL 3529775, at \*10 (Cal. Ct. App. Sept. 13, 2010) (holding DNA report testimonial); *Michigan v. Dendel*, No. 247391, 2010 WL 3385552 (Mich. Ct. App. 2010) (holding forensic chemical analysis testimonial); *State v. Lui*, 221 P.3d 948, 955 n.11, 956 n.14 (Wash. Ct. App. 2009) (holding autopsy and DNA reports testimonial, but were not used in lieu of live expert testimony).

<sup>169</sup> *White v. Illinois*, 502 U.S. 346, 358-60 (1992) (Thomas, J., concurring).

"right of confrontation evolved as a response to the problem of trial by affidavit."<sup>170</sup> But, Justice Thomas went on to note, the Confrontation Clause was not intended to encompass hearsay in general or in totality.<sup>171</sup> Drawing the line at what documents were "made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties" and, ultimately, lead to a merger of the evidentiary hearsay doctrine and the Confrontation Clause.<sup>172</sup> Justice Thomas found:

One possible formulation is as follows: The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process [citation omitted by author], and under this approach, the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed.<sup>173</sup>

Justice Thomas reiterated his position in his opinion, concurring in part and dissenting in part, in *Davis v. Washington*.<sup>174</sup> The Justice criticized the Court's opinion by stating that the Court had adopted an "unpredictable test, under which district courts are charged with divining the 'primary purpose' of police interrogations."<sup>175</sup> Reaffirming his prior position, Justice Thomas wrote that a testimonial statement was "necessarily [one that] require[s] some degree of solemnity...."<sup>176</sup> A primary purpose test, whether statements are made for purposes of later use at trial or are made in response to an emergency, is rarely present in reality and is not reliably discernable, making it inevitable that the search for such a purpose is largely "an exercise in fiction."<sup>177</sup>

## VII. BUSINESS AND PUBLIC RECORDS

Experts often rely upon various outside information and records in forming opinions. Justice Scalia in *Melendez-Diaz* made the distinction between business record and public records that are not made for use at trial and those that are created specifically for use in the particular criminal trial.<sup>178</sup> As long as the records are made for the carrying on or the administration of the business or public office, the records meet both the Confrontation Clause and hearsay requirements.<sup>179</sup> This analysis requires the person that prepared the document to testify if the document was made specifically for use at trial.<sup>180</sup>

To be true to the plain meaning of the Confrontation Clause, even those witnesses who create a business record or a public record and those witnesses who provide the personal knowledge that is contained in those records would have to testify. This notion has been rejected. The Confrontation Clause has become a matter of line drawing. Since this is true, there must be a rational basis for distinguishing between records made as part of the activities of the business or agency and those records that are made specifically for litigation.

<sup>170</sup> *Id.* at 362 n.1.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 364.

<sup>173</sup> *Id.* at 365.

<sup>174</sup> *Davis v. Washington*, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in part, dissenting in part).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 836.

<sup>177</sup> *Id.* at 839.

<sup>178</sup> *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2538 (2009).

<sup>179</sup> *Id.* at 2539-40.

<sup>180</sup> *Id.* at 2540.

Business records that meet the hearsay exclusion and are made as part of business activities are not testimonial.<sup>181</sup> The custodian or other qualified witness (a witness who knows how the records are made and kept) can testify in court to the foundation for the record.<sup>182</sup> The custodian or other qualified witness is not required to have any personal knowledge about the underlying facts that are contained in the record. In fact, the records can be self-authenticating if a certificate is made by the custodian or other qualified witness that establishes the foundation for the business record.<sup>183</sup> The issue has not been addressed by the courts, but it would seem under Justice Scalia's interpretation of the Confrontation Clause that a witness would be required to come into court to testify to the foundation for the business record and that introduction of a certificate meeting Fed. Rule Evid. 902(11) would be a violation. The cross-examination of the custodian or other qualified witness would prove of little assistance to the defendant because the witness generally has no knowledge of the underlying facts. The defendant cannot meaningfully cross-examine the custodian or other qualified witness concerning the underlying facts whose truth, once the business record foundation has been laid, is assumed. There is simply no rational distinction.

For the same reasons, a public record where a person comes to the trial court to testify would be admissible if made as an activity of the agency, but the public record could not be self-authenticating. This requirement simply is not workable nor does it further a criminal defendant's confrontation rights.

For example, some circuit courts now hold that a public agency's "certificate of nonexistence of record" (CNR) is insufficient and that the person who prepared the certificate must appear in court.<sup>184</sup> The cross-examination of the person performing the records search would prove of little assistance to the defendant. There is no meaningful cross-examination of the witness who can only testify that a search was made for the record and it does not exist. There is no rational distinction between the public employee who prepares a certificate of non-existence and having the certificate admitted at trial and the same public employee appearing in court for cross-examination.

Other public records have been permitted where cross-examination of a live witness may have proven beneficial to the defendant. A warrant for removal and documents attesting to the removal have both been found not to be testimonial because the documents were not created for future prosecution.<sup>185</sup>

<sup>181</sup> See, e.g., *United States v. Dadaille*, 373 F. App'x 380, 382-83 (4th Cir. 2010) (holding business record was neither testimonial nor hearsay and, therefore, not excludable under the confrontation clause); *United States v. Jackson*, 635 F.3d 875, 880-82 (5th Cir. 2010) (holding drug dealer's ledgers were testimonial; however, reversed because ledgers were not properly authenticated and failed to meet hearsay exception requirements under 803(6)); *California v. Suen*, No. B208155, 2010 WL 4401796, at \*7-8 (Cal. Ct. App. Nov. 8, 2010) (holding cell tower records are official business records and therefore non-testimonial); *Palacios v. State*, No. 02-09-00332-CR, 2010 WL 4570072, at \*5 (Tex. App. Nov. 4, 2010) (holding hospital records containing blood alcohol levels were medical records created for treatment purposes and thus admissible).

<sup>182</sup> FED. R. EVID. 803(6).

<sup>183</sup> FED. R. EVID. 902(11).

<sup>184</sup> See *United States v. Scott*, 2010 WL 4627876 (11th Cir. 2010) (summary of excerpts of business records prepared for litigation); *United States v. Gonzales*, 2010 WL 4342192 (2nd Cir. 2010) (IRS certification that defendant failed to file tax returns); *United States v. Gipson*, 2010 WL 2790646 (9th Cir. 2010) (declaration stating that an FDIC search revealed no record); *United States v. Norwood*, 595 F.3d 1025, 1029-30 (9th Cir. 2010) (affidavit of absence of any record with Washington Department of Employment); *United States v. Martinez-Rios*, 595 F.3d 581, 584-85 (5th Cir. 2010) (certificate of no record); *United States v. Troxler*, 2010 WL 3168147 (5th Cir. 2010) (certificate of non-existence of tax returns); *United States v. Madarikan*, 356 Fed. App'x 532 (2nd Cir. 2009) (CDR).

<sup>185</sup> *United States v. Orazco-Acosta*, 607 F.3d 1156 (9th Cir. 2010); *United States v. Villaviencio-Burrueal*, 608 F.3d 556 (9th Cir. 2010); *United States v. Diaz-Gutierrez*, 354 Fed. App'x 774 (4th Cir. 2009); *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005).

Some courts have made the distinction between whether the business records or public records were made for this specific prosecution as opposed to records created in general. For example, certificates of inspection of an intoxilyzer machine<sup>186</sup> and logbooks concerning a breathalyzer<sup>187</sup> were found to be nontestimonial because the acts or facts recorded did not pertain to this particular prosecution. Other courts, even after *Melendez-Diaz*, seem to indicate otherwise, finding that the information is permissible because it is "neutral information."<sup>188</sup> In an alien smuggling case, the introduction of the smuggled aliens "I-213 forms taken from their A-files" did not violate *Crawford-Melendez-Diaz* because those records contained "only routine biographical information"<sup>189</sup>

### VIII. CONFRONTATION, RULE 402, AND THE RULE 703 BALANCING TEST

In 2000, Fed. Rule Evid. 703 was amended to include the following language:

Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.<sup>190</sup>

The balancing test was added to the Rule because circuit courts differed on whether the underlying basis was admissible and could be disclosed to the jury at all.<sup>191</sup> The Comment to the amendment indicates that if the underlying basis is admitted a limiting instruction must be given. The comment went further, stating:

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert.<sup>192</sup>

As to how the States have dealt with the issue in their courts, certain states have adopted rules similar to Rule 703 that resolve the issue by requiring that any underlying basis be proven to the satisfaction of the factfinder at trial.<sup>193</sup> Other states have adopted the pre-amended Rule 703 without the balancing test<sup>194</sup> or the amended version of Rule 703.<sup>195</sup>

<sup>186</sup> Jackson v. State, No. A10A2041, 2010 WL 4609148 (Ga. App. Nov. 16, 2010).

<sup>187</sup> Illinois v. Jacobs, No. 4-09-0878, 2010 WL 4366876 (Ill. App. Nov. 1, 2010).

<sup>188</sup> State v. Ducasse, No. Ken-10-159, 2010 WL 4456993 (Me. Nov. 9, 2010) (certificate of compliance by manufacturer of blood collections kits used in testing blood alcohol levels); State v. Murphy, 991 A.2d 35 (Me. 2010) (certificate issued by Secretary of State concerning driving record and suspension and holding that testimony would have little practical benefit on cross-examination); State v. Carter, 241 P.3d 1205 (Or. App. 2010) (warrant based upon failure to appear, holding that the record was not created for purposes of specific criminal prosecution).

<sup>189</sup> United States v. Caraballo, 595 F.3d 1214, 1226 (11<sup>th</sup> Cir. 2010).

<sup>190</sup> 192 F.R.D. 340, 424 (2000).

<sup>191</sup> *Id.* (Committee notes referring to two contrary circuit cases: *United States v. Rollins*, 862 F.2d 1282 (7<sup>th</sup> Cir. 1988) (permitting evidence that was otherwise inadmissible); *United States v. 0.59 Acres of Land*, 109 F.3d 1493 (9<sup>th</sup> Cir. 1997) (finding error in the admission of otherwise inadmissible evidence)).

<sup>192</sup> *Id.* at 425.

<sup>193</sup> *E.g.*, MICH. R. EVID. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence").

<sup>194</sup> ALASKA R. EVID. 703; I.C.A. R. 5.703; LA. CODE EVID. ART. 703; ME. R. EVID. 703; MONT. CODE ANN. § 26-10-703 (1976); NEV. REV. STAT. 50.285 (1971); N.H. R. EVID. 703; N.J. R. EVID. 703; N.C. GEN. STAT. ANN. § 8C-703 (WEST 1983); OR. REV. STAT. § 40.415 (1981); PENN. R. EVID. 703; S.D. CODIFIED LAWS § 19-15-3 (2010); TEX. R. EVID. 703; WASH. R. EVID. 703; W. VA. R. EVID. 703.

<sup>195</sup> ARIZ. R. EVID. 703; COLO. R. EVID. 703; N.D.R. EVID. 703; OKLA. STAT. TIT. 12, CH. 40, § 2703 (1978); UTAH R. EVID. 703.

The Amendment gives rise to the following issues: (1) whether the balancing test is sufficient to protect a defendant's confrontation rights; (2) whether a limiting instruction is sufficient to protect a defendant's confrontation rights; and (3) whether the presumption against admission is sufficient to protect a defendant's confrontation rights.

#### **A. CONFRONTATION AS A RULE 402 ISSUE**

Perhaps the wisest course in determining these issues requires us to return to the threshold relevance inquiry in the evidentiary analysis. Fed. Rule Evid. 402 states that relevant evidence is admissible "except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules. . . ." The language of the rule suggests that once a relevance determination has been made one question to ask is whether the Constitution permits the use of such evidence. So that even if relevant, evidence may be excluded if it violates the Confrontation Clause. If this is true, the issue of the admissibility of the underlying basis of an expert's opinion must first go through confrontation testing. Under this analysis, Confrontation Clause issues are considered before the Rules of Evidence. Further, the balancing test would only apply to evidence that has been found to be admissible under the Confrontation Clause and inadmissible under the rules of evidence. If the analysis begins at 402 instead of 703, all three issues are avoided because it is not the Rule of Evidence or the balancing test, but the Constitution itself that protects the defendant's confrontation rights.

#### **B. CONFRONTATION AS A RULE 703 ISSUE**

However, when it comes to the basis of an expert's opinion, courts tend to conduct their analysis under Rule 703. First, the Confrontation clause issue could be considered in determining whether the evidence is "otherwise inadmissible." Second, under the balancing test, any Confrontation Clause issue could be considered in the "prejudicial effect" portion of the analysis. The appropriate analysis under Rule 703 would be:

*Step 1.* Is the evidence admissible? This would require subjecting the fact or data to an analysis through the Rules of Evidence and the Confrontation Clause. If the evidence is admissible and has been or will be admitted into evidence at trial, there would be no Confrontation issue. However, if the evidence is "otherwise inadmissible," the trial court would then go to Step 2.

*Step 2.* If the evidence is inadmissible under the Rules of Evidence, can the evidence be admitted to test the basis for the expert's opinion or inference? This would require considerations of the presumption against admissibility, the Confrontation Clause, and the satisfaction of the balancing test.

The problem with Rule 703 and permitting testimony concerning the underlying basis of the expert's opinion is that the Rule then becomes an end run around the Rules of Evidence. It becomes a *de facto* hearsay exception. If the witness expert testifies that the facts are those that are reasonably relied upon by experts in the field, the factfinder will, just as the expert does, assume that those underlying facts are true. The "reasonably relied upon" phrase becomes magic language used by the proponent of the underlying basis of an expert opinion to avoid Confrontation and the Rules of Evidence.

The jurors' proper function as trier of fact is taken away when the expert assumes facts as true for purposes of his opinion or inference. There is no ability for the jurors to test the underlying facts. The facts are admitted because the facts are of a type that are reasonably relied upon by experts in the field in forming an opinion or inference. This makes the expert the determiner of what is true. The only possible line of cross-examination is to point out that the opinion relies upon the basis being true. The expert opinion falls if the expert admits that a sufficient number of the facts are false, but that depends upon the expert determining whether the underlying basis is true or false. The cross-examiner is required to ask either a general question, which in itself is not

very effective, or to ask specific questions concerning each underlying fact, which then reinforces the fact as being true, whether true or is not.

### C. LIMITATION ON LIMITING INSTRUCTIONS

The efficacy of limiting instructions has long been questioned.<sup>196</sup> "Empirical evidence as well as common sense suggests that courts greatly exaggerate the efficacy of limiting instructions."<sup>197</sup> Limiting instructions are not talismans for the solution of any possible prejudice.<sup>198</sup> The possibility that the jury will consider evidence only to its limited purpose is occasionally overcome by the negative aspects as to be unmanageable from the jurors perspective.<sup>199</sup>

The argument can be made that a limiting instruction is sufficient if it advises the "otherwise inadmissible" evidence can only be considered as it goes to the foundation for the expert's opinion or inference and cannot be used for the truth of the underlying facts. If the jurors can actually perform these mental gymnastics, the defendant's confrontation rights are said to be protected. The question arises whether a reasonable juror can actually separate out these two separate uses. Whether the use of a limiting instruction when it comes to separating out the proper and improper use of the evidence can conceivably eliminate the risk of misuse is an open matter.<sup>200</sup> Limiting instructions are a nicety and are perhaps a necessary method of attempting to prevent jurors from improperly considering this evidence. Empirical research has found that limiting instructions are generally unsuccessful at controlling how the jurors' perceive and utilize evidence.<sup>201</sup>

Limiting instructions are not up to the task that the Rules of Evidence require. It is difficult if not impossible for jurors to determine what is admissible because it is "reasonably relied upon by experts in the field in forming their opinions" to be used only for testing the basis of the expert's opinion and to differentiate that from the assumption that those facts are true.

### D. PRESUMPTION AGAINST ADMISSIBILITY

The Advisory Committee Notes to the Rule 703 balancing test state that there is a presumption against admissibility of the "otherwise inadmissible" basis for an expert's opinion.<sup>202</sup> Otherwise inadmissible evidence "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."<sup>203</sup> This places on the proponent of the testimony the burden of going forward with evidence sufficient to prove certain propositions by a preponderance of evidence. First, the trial court is required to determine the weightiness of that the evidence will have with the jurors only to the extent that it will help the jury to evaluate the expert's opinion. Second, the court is required to determine the weightiness of any prejudicial effect. Finally, the court is then to balance those two items to determine whether the probative value previously determined "substantially" outweighs the prejudicial effect.

This balancing test will have to be applied by the trial court either before trial or as each piece of "otherwise inadmissible" evidence is introduced at trial. If not determined pretrial,

<sup>196</sup> Lieberman and Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 677 (2000).

<sup>197</sup> Richard A. Posner, *Frontiers of Legal Theory* 384 (2001).

<sup>198</sup> *United States v. Schiff*, 612 F.2d 73, 82 (2nd Cir. 1979).

<sup>199</sup> *Id.*

<sup>200</sup> See, e.g., *Illinois v. Clay*, 884 N.E.2d 214 (Ill. App. 2008) (concerning the introduction of a prior conviction and the limiting instruction that the conviction could only be used for credibility).

<sup>201</sup> Lieberman & Arndt, *supra* note 195.

<sup>202</sup> 192 F.R.D. 340, 424-25 (2000).

<sup>203</sup> *Id.*



each piece of facts or data of "otherwise inadmissible" evidence will require an objection or motion to strike, a bench conference, a ruling, and a limiting instruction that advises the jury either to disregard the evidence or to consider the evidence only as it goes to an evaluation of the expert's opinion and not as substantive evidence.

## IX. BASES OF EXPERT OPINION AND JURY INSTRUCTIONS

Perhaps if the trial court judge does five things, violation of the Confrontation Clause might be minimized, but it cannot be completely eliminated. First, the trial judge must carefully scrutinize the underlying basis to determine whether or not the facts and data are admissible. Second, the trial judge must make sure that the basis meets the Rule 703 requirements when he has found that the basis consists of some facts or data that are "otherwise inadmissible" to determine whether those facts are "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Third, the trial judge must run the basis through the gauntlet of the special balancing test. Fourth, the judge must give a limiting instruction before and after the evidence is offered. Fifth and finally, the trial judge must properly instruct the jury.

The final instruction to the jury must remind them that the jurors, and not the expert, must make the determination whether the underlying basis is true or not. The jurors cannot, as seems natural, assume the truth of the underlying facts and data, but must themselves find the facts to be true or not. It would not be hard to inform the jurors that the jurors, and not the expert, are the final arbiters of the truth.

Most current pattern jury instructions are not up to the job. The Federal Pattern Jury Instructions appear to surrender the truth-finding function of the underlying basis to the expert. The Federal Pattern Criminal Jury Instruction as pertinent to this issue only provides "[y]ou must also decide whether his opinions were based on sound reasons, judgment, and information."<sup>204</sup> This pattern instruction requires the juror to dissect the sentence to discover that the expert opinion was based on "sound . . . information." The First Circuit has a pattern jury instruction concerning weighing the testimony of an expert that states, in pertinent part:

In weighing the testimony, you should consider the factors that generally bear upon credibility of a witness as well as the expert witness's education and experience, the soundness of the reasons given for the opinion, and all other evidence in this case.<sup>205</sup>

Somewhere in that instruction, the jurors' are required to discern that they are required to be fact finders concerning the underlying basis of the expert's opinion. The Fifth, Seventh, Ninth and Tenth Circuits have similar instructions.<sup>206</sup>

The Eighth Circuit has an instruction that informs the jurors that they do not have to accept an expert opinion and that they should "consider the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case."<sup>207</sup> Somehow that instruction is supposed to inform the jurors that the underlying facts and data are subject to truth finding by the jurors themselves. The Third Circuit does better by informing the jurors, "in weighing this opinion testimony you may consider...the reliability of the information supporting the witness' opinions...."<sup>208</sup>

<sup>204</sup> PATTERN CRIM. JURY INSTR. 35 (1987).

<sup>205</sup> PATTERN CRIM. JURY INSTR. 1ST CIR. 2.06 (1998).

<sup>206</sup> PATTERN CRIM. JURY INSTR. 5TH CIR. 1.17 (2001); FED. CRIM. JURY INSTR. 7TH CIR. 3.07 (1999); MODEL CRIM. JURY INSTR. 9TH CIR. 4.14 (2010); PATTERN CRIM. JURY INSTR. 10TH CIR. 1.17 (2011).

<sup>207</sup> MODEL CRIM. JURY INSTR. 8TH CIR. 4.10 (2007).

<sup>208</sup> MOD. CRIM. JURY INSTR. 3RD CIR. 2.09.

Some State courts do a much better job in letting the jurors know their specific truth-finding function. California informs the jurors, in pertinent part:

An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion.<sup>209</sup>

Massachusetts has an alternate instruction concerning expert opinions that provides, in pertinent part:

It is also entirely up to you to decide whether you accept the facts relied on by the expert and to decide what conclusions, if any, you draw from the expert's testimony. . . . You must also, as has been explained, keep firmly in mind that you alone decide what the facts are. If you conclude that an expert's opinion is not based on the facts, as you find them to be, then you may reject the testimony and opinion of the expert in whole or in part . . . . You must remember that expert witnesses do not decide cases: juries do. . . .<sup>210</sup>

New Jersey carefully instructs jurors that it is the function of the jury, not the expert, "to determine whether the facts on which the answer or testimony of an expert is based actually exists."<sup>211</sup>

Despite these samples, courts do a very poor job in instructing the jurors about their truth-finding function overall. The only appropriate way to be sure that a criminal defendant's confrontation rights are observed is to permit cross-examination of a testifying witness and advise the jurors of their truth-seeking role concerning the underlying facts and data for an expert opinion.

## **X. NOTICE AND DEMAND STATUTES**

Notice-and-demand statutes require that the prosecution must first provide notice that an expert will testify at trial. The defendant after receiving the prosecution's notice must either assert his confrontation right to have the witness testify at trial or forfeit that right.<sup>212</sup> Citing *Taylor v. Illinois*<sup>213</sup> and *Williams v. Florida*,<sup>214</sup> the Court held in *Melendez-Diaz* that the defendant can be required to assert his confrontation rights before trial.<sup>215</sup>

Justice Scalia thought that defense attorneys would often stipulate to certain expert testimony.<sup>216</sup> He surmised that it would be unlikely that the defense would insist on the appearance and testimony from witnesses that the defense does not intend to challenge.<sup>217</sup> In a rational and reasonable world this may be true. However, a criminal defendant can constitutionally insist at trial on proof beyond a reasonable doubt as to each and every element, and a criminal defendant is not required to forego his Confrontation Clause rights for any reason. In fact in some jurisdictions that have notice-and-demand statutes, defense attorneys as a matter of course file demands for live testimony from every expert.

The fact that the defendant can be required pre-trial to demand live testimony from an expert does not entirely resolve the issue concerning the underlying basis for the expert's opinion

<sup>209</sup> CAL. JURY INSTR.-CRIM. 2.80 (2010).

<sup>210</sup> CRIM. MODEL JURY INSTR. 3.640 (2009).

<sup>211</sup> N.J. MODEL CRIM. JURY INSTR. EXPERT TESTIMONY (2003).

<sup>212</sup> *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2541 (2009).

<sup>213</sup> *Taylor v. Illinois*, 484 U.S. 400 (1988) (upholding sanctions for defendant's failure to provide witness names and location pre-trial).

<sup>214</sup> *Williams v. Florida*, 399 U.S. 78 (1970) (upholding a requirement for pre-trial alibi notice).

<sup>215</sup> *Melendez-Diaz*, 129 S.Ct. at 2541.

<sup>216</sup> *Id.* at 2542.

<sup>217</sup> *Id.*

or inference. Still left to be resolved are those pesky "otherwise inadmissible" facts underlying the expert's testimony. To solve this problem, the notice-and-demand requirement could be expanded to include a defendant's notice that the prosecution will be required to prove each and every underlying fact at trial, either through personal knowledge of the expert or through some other witness or method of proof.

## XI. SEARCHING FOR A SOLUTION

An acute problem arises when the expert becomes unavailable by reason of loss, change of employment, severe illness or infirmity, death, or another unforeseen circumstance. To exclude another expert's reliance upon an expert who has become unavailable in one of these situations would give the defendant an unfair advantage. As the *Mattox* Court indicated in 1895 in reference to the Confrontation Clause:

There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness . . . . But general rules of this kind however beneficent in their operation and valuable to the accused, must occasionally give way to consideration of public policy and the necessities of the case . . . . The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved for the accused.<sup>218</sup>

A defendant's right to cross-examine and the efficacy of any cross-examination should be considered in determining what "otherwise inadmissible" evidence should be permitted as the basis for an expert's opinion.

An actual example of the problem is presented in *United States v. Williams*, a Federal District Court case.<sup>219</sup> Williams was charged with murder, and one expert conducted the autopsy.<sup>220</sup> However, this expert retired and moved overseas.<sup>221</sup> The prosecution filed a motion in limine to permit the introduction of the autopsy report and death certificate from the unavailable expert, the introduction of a diagram and photographs taken during the autopsy; and the testimony of another medical examiner who was not present at the autopsy but who examined the materials and formed his own opinion about the cause and manner of death.<sup>222</sup> Certainly it would be an unjust result if the prosecution was not able to use at least some of this evidence at trial.

The first possible solution is to adopt a rule in criminal cases that requires that the factual underlying basis of the expert's opinion be proven. The right to confront would be fulfilled by the introduction of direct evidence from the testifying expert or from other individuals, expert or not, that could testify to underlying facts. All witnesses would be subject to cross-examination. This would be truest to the literal constitutional language. This is the classic and perhaps easiest solution to the problem. But it also would require more testimony by more witnesses where expert testimony is involved. In our example, because of the unavailability of the expert who performed the autopsy, the autopsy report would be inadmissible. Whether the diagram and the photographs are admissible is a question of establishing the appropriate foundation through the Rules of Evidence and is not a confrontation issue. Without the pathologist who did the autopsy, created the diagram, and took the photographs, a satisfactory evidentiary foundation could not be met. The cause and manner of death could not be proven with this solution. The cost of this first solution is simply too high.

<sup>218</sup> *Mattox v. United States*, 156 U.S. 237, 243 (1895).

<sup>219</sup> *United States v. Williams*, 2010 WL 4071538 (D.D.C. Oct. 18, 2010).

<sup>220</sup> *Id.* at \*1.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

If the first solution is rejected, it becomes a matter of line-drawing. Justice Thomas has suggested one place to draw that line: in order to be testimonial and require confrontation, the testimonial statement would have to be "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."<sup>223</sup> The question, of course, is what the language means and how those enumerated items would be construed by the courts. This solution would require the development of case law over a period of time. It would be easy to state that the autopsy report was not "formalized materials," not an affidavit, not a deposition, not prior testimony, and certainly not a confession. However, whether the autopsy report would be considered "formalized testimonial materials" is problematic. Justice Thomas formula would have to be tested and refined in the trial courts.

The third solution is to draw the line on a hypothetical view of an "objective person" as Justice Scalia suggests.<sup>224</sup> That objective witness would need to find that it was reasonable to believe that the statement would be available for use at a later trial.<sup>225</sup> But, a reasonable witness would never truly believe, after a little rational reflection, that when he has witnessed something that relates to a criminal offense and makes a statement about it, that any statement the witness makes would not be used at trial. So the question arises, what statements could be permitted under Justice Scalia's standard? Justice Scalia's point of view is wrong: it is not the reasonably objective witness's point of view, but rather whether a reasonable defendant could benefit from the cross-examination of the witness.

Under Justice Scalia's analysis, in order to satisfy the Confrontation Clause, a witness must either testify in court or, if unavailable, the defendant had a prior opportunity for cross-examination.<sup>226</sup> In our example, the hypothetical "objective witness," or the reasonable pathologist, would know that one of the functions of an autopsy report is for use at a later trial. Because the witness knows this, the autopsy report could not be admitted at trial, except, under current practice, as perhaps part of the underlying bases of an opinion or inference by a testifying expert and even then, it could not be used for substantive purposes.

As a fourth solution, "testimonial" can be refined to exclude certain items but permit others. First, "testimonial" evidence should exclude items that were not prepared for a specific prosecution. For example the types of information that might be excluded include certificates or logbooks of inspection of an intoxylizer<sup>227</sup> or certificate of compliance by a manufacturer that blood collection tubes complied with state requirements.<sup>228</sup>

Second, "testimonial" should exclude business records or public records that contain "neutral information" irrespective of whether the record was made in pursuance of the business or agency's activities or whether it was prepared for a particular prosecution. While it appears Justice Scalia would permit the introduction of certain business and public records prepared for the furtherance of the business or agency and not made for this particular litigation,<sup>229</sup> this category would be expanded to include certain records that were specifically created for use in this particular prosecution. For example, courts have permitted the introduction of certificates from the Secretary of State concerning motor vehicle licenses, records, and suspensions, without requiring someone from that office to appear and testify in court.<sup>230</sup> Another example would be evidence of court judgments concerning convictions. A certified copy of the judgment that is specifically requested by the prosecution and created by a court clerk's office should not be

<sup>223</sup> *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2543 (2009) (Thomas, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

<sup>224</sup> *Melendez-Diaz*, 129 S.Ct. at 2532.

<sup>225</sup> *Id.* at 2531.

<sup>226</sup> *Id.*

<sup>227</sup> *Jacobson v. State*, 2010 WL 4609148 (Ga. Ct. App. Nov. 16, 2010); *Illinois v. Jacobs*, 2010 WL 4366876 (Ill. App. Ct. Nov. 1, 2010).

<sup>228</sup> *State v. Ducasse*, 8 A.3d 1252 (Me. 2010).

<sup>229</sup> *Melendez-Diaz*, 129 S.Ct. at 2538.

<sup>230</sup> *State v. Murphy*, 991 A.2d 35 (Me. 2010).

excluded because a live witness did not testify – although that appears to be the result of the holding in *Melendez-Diaz*. However, if the point of view of a reasonable defendant is adopted and the benefit the defendant might receive through cross-examination is weighed, these documents, although prepared for this particular prosecution, would be admissible.

Third, "testimonial" should exclude, during an expert's testimony on direct examination, any evidence that is otherwise inadmissible. However, such evidence should be permitted during cross examination and, to the extent raised on cross-examination, during redirect examinations. The defendant, who is under no confrontation requirement, can thus open the door to the prosecution's use of this otherwise inadmissible evidence.<sup>231</sup> This would jettison the current Fed. Rule Evid. 703 balancing test and its State's corollaries from use in a criminal case. The matter would be one of the jurors assessing the truth of facts underlying the expert's opinion or inference. As discussed above, Rule 703 has been used to justify the admission of evidence that the jury should not receive because it is inadmissible under the Rules of Evidence and inadmissible as a violation of the Confrontation Clause.

If, however, the admission of the "otherwise inadmissible" basis for expert opinion's continues, the trial court must ensure to the fullest extent possible that a defendant's Confrontation Clause rights are observed. This is best performed by utilizing an exacting evidentiary analysis that requires: (1) the trial court determines whether the facts underlying the opinion are admissible or inadmissible; (2) the trial court determines whether the inadmissible facts or data are reasonably relied upon by experts in the field in forming their opinions; (3) the trial court applies the special balancing test in Rule 703; (4) the judge gives a limiting instruction before and after the evidence; and (5) the jury is properly instructed as to its role in determining the truth of the underlying facts or data.

The application of the fourth solution would not permit the admission of the autopsy report except on cross-examination and re-direct examination to the extent cross opened the door for such evidence. More specifically, the autopsy report could not be disclosed unless the defendant was the first proponent of the evidence.

The District Court Judge in the *Williams* case came up with the following findings of fact, conclusions of law, and orders. First, the Judge found that the autopsy report and death certificate were testimonial.<sup>232</sup> Because the documents were testimonial, the Judge excluded them from being admitted at trial.<sup>233</sup> Further the Judge stated that the prosecution could not make an end run around *Melendez-Diaz* by having another expert testify to the contents of the autopsy report.<sup>234</sup> Referencing Fed. Rule Evid. 703, the Court held that the second expert could testify to his own independent opinion concerning the cause or manner of death, even if this expert relied on the excluded autopsy report.<sup>235</sup> However, the underlying facts or data that were otherwise inadmissible were not admissible on direct examination.<sup>236</sup>

## XII. CONCLUSION

Courts have permitted "otherwise inadmissible" evidence underlying an expert's opinion to be presented to the jury both through the *Ohio v. Roberts*<sup>237</sup> "indicia of reliability" and the *Crawford v. Washington*<sup>238</sup> "opportunity to cross-examine" analyses. Courts have made the analyses go both too far and not far enough in protecting a criminal defendant's Confrontation

<sup>231</sup> See, e.g., *United States v. Lopez-Medina*, 596 F.3d 716, 733 (10th Cir. 2010) (holding that "a defendant can open the door to admission of evidence otherwise barred by the Confrontation Clause.").

<sup>232</sup> *United States v. Williams*, 2010 WL 4071538, at \*2 (D.D.C. Oct. 18, 2010).

<sup>233</sup> *Id.* at \*4.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at \*5.

<sup>237</sup> *Ohio v. Roberts*, 448 U.S. 56 (1980).

<sup>238</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

Clause rights. Rule 703 surreptitiously allows jurors to assume inadmissible facts as true. Courts avoid a Confrontation Clause analysis by using the legal fiction that the evidence is not being admitted for its truth, but rather as a tool for the jurors to examine the expert's opinion or inference. Because the Supreme Court has never gone sufficiently far enough to explain the parameters of the Confrontation Clause, trial and circuit courts are struggling with how that Clause and expert testimony under the Rules of Evidence fit together. Compounding the problem is the expansion of fields of expertise and the utilization of expert testimony at trial.

The change in the point of view from an objective witness to a reasonable defendant's point of view and the measuring of the possible benefit of cross-examination concerning the particular evidence would improve Confrontation Clause analysis as it relates to experts. Under this analysis, a certificate of no report or a certified court record would be admissible because there is little benefit from cross-examining an analyst who searched or certified the records. *Melendez-Diaz* requires the exclusion of those records and requires the appearance of a witness. Under this analysis, certificates of analysts would not be admissible because there is benefit from cross-examining an analyst to determine whether the results of any testing, whether for drugs, alcohol, or DNA, were both reliable and verifiable. *Melendez-Diaz* requires the same result.

**IS TENNESSEE V. GARNER STILL THE LAW?**

Eric M. Ziporin and Elliot J. Scott

Since 1985, it would be hard to find any police cadet who did not receive training at the police academy on *Tennessee v. Garner*<sup>1</sup>. Lower courts and commentators consistently believed that *Garner* dramatically altered the "use of force" landscape by prohibiting the use of deadly force on a fleeing suspect unless the suspect posed a significant threat of death or serious bodily injury to the police or others.

However, the United States Supreme Court's recent decision in *Scott v. Harris* significantly clarified the Fourth Amendment standard for claims of excessive force arising under federal law.<sup>2</sup> Though the case most directly affects police pursuits, *Harris* also gave lower courts explicit directions in applying the Fourth Amendment more generally. In *Harris*, the plaintiff asserted that the officer's actions in terminating the pursuit with deadly force had to be analyzed under the standard in *Garner*.<sup>3</sup> Citing *Garner*, the plaintiff alleged that certain "preconditions" had to be met before the officer could prevail under the Fourth Amendment: (1) that the suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning.<sup>4</sup>

The Supreme Court rejected this rigid application of its previous excessive force case law, and noted that there was no "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force."<sup>5</sup> The Supreme Court contrasted *Garner* with the facts in *Harris* noting that the threat posed by an unarmed suspect on foot is not remotely comparable to the level of danger posed to the public and police officers by a suspect fleeing recklessly in a vehicle.<sup>6</sup>

The Supreme Court ruled that, when analyzing an officer's conduct in an excessive force case arising out of a vehicular pursuit, lower courts must weigh the risk posed by the officer's conduct against the threat posed by the suspect.<sup>7</sup> Thus, the Court considered that the plaintiff in *Harris* intentionally placed both himself and the public in danger by unlawfully engaging in a reckless high-speed chase.<sup>8</sup> The Court noted that those who could have been harmed by the fleeing suspect were innocent, and the suspect had engaged in intentionally criminal conduct.<sup>9</sup> With sweeping language, the Supreme Court held that an "officer's attempt to terminate a dangerous high-speed vehicle pursuit that threatens the lives of the public does not violate the Fourth Amendment," even when the attempt places the suspect at risk of serious injury or death.<sup>10</sup>

There is good reason to believe that *Garner* has been all but cast aside as a tool for analyzing any excessive force case except those with identical facts. In a recent decision by the federal District Court in Colorado, Chief Judge Edward W. Nottingham noted that it would be error to assume that *Garner* remains the law governing the use of deadly force.<sup>11</sup> In *Cordova*, a lengthy pursuit ended when the driver drove his truck and trailer the wrong way down an interstate highway at night.<sup>12</sup> The officer, who was ahead of the driver attempting to

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<sup>1</sup> *Tennessee v. Garner*, 471 U.S. 1 (1985).

<sup>2</sup> *Scott v. Harris*, 127 S.Ct. 1769 (2007).

<sup>3</sup> *Id.* at 1777.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1 (1985)) (citations omitted).

<sup>7</sup> *Id.* at 1778.

<sup>8</sup> *Id.*

<sup>9</sup> *Harris*, 127 S.Ct. at 1778.

<sup>10</sup> *Id.*

<sup>11</sup> *Cordova v. Aragon*, 560 F.Supp. 2d 1041, 1063 (D. Colo. May 20, 2008).

<sup>12</sup> *Id.* at 1043-48.

deploy stop sticks, was caught in the roadway with the truck headed in his direction.<sup>13</sup> The officer fired his weapon at the truck as it approached and passed him, killing the driver with a bullet that entered the side of the truck.<sup>14</sup>

The court dismissed the case against the officer by applying *Harris*.<sup>15</sup> Judge Nottingham concluded that, regardless of whether the officer was in personal danger when he fired the fatal shot, the threat the driver posed to innocent motorists and other police officers was so great that deadly force was warranted.<sup>16</sup> In so ruling, Judge Nottingham noted that in *Harris*, the Supreme Court suggested that *Garner* is "utterly unpersuasive authority" when considering the reasonableness of the force used in terminating a police pursuit.<sup>17</sup>

The implications of *Harris* are therefore far-reaching, not only in the context of police pursuits, but also in the analysis of deadly force cases generally. Avoiding rigid tests or preconditions, the Supreme Court has given direction to the lower courts to assess the objective reasonableness of the use of deadly force under the traditional "totality of the circumstances" analysis. Equally important, *Harris* instructs the lower courts to weigh, in the totality of circumstances, the relative culpability of the parties and the contrasting threat of injury to the suspect, the officer, and the public. This dramatically diminishes the utility of *Garner* in analyzing use of force issues, while reaffirming the essential Fourth Amendment requirement: reasonableness in light of the situation confronted by the officer.

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<sup>13</sup> *Id.* at 1044-46.

<sup>14</sup> *Id.* at 1046.

<sup>15</sup> *Id.* at 1051-65.

<sup>16</sup> *Cordova*, 560 F.Supp. 2d at 1058-59.

<sup>17</sup> *Id.* at 1063.



## THE IMPACT OF *ARIZONA V. GANT* ON SEARCH AND SEIZURE LAW AS APPLIED TO VEHICLE SEARCHES

Michael C. Gizzi<sup>1</sup> and R. Craig Curtis<sup>2,3</sup>

### I. INTRODUCTION

On April 21, 2009, the United States Supreme Court handed down a decision that sent shock waves through the law enforcement community. *Arizona v. Gant*<sup>4</sup> significantly modified the Supreme Court's rules for vehicle searches incident to arrest—rules that had been in place since the 1981 decision in *New York v. Belton*.<sup>5</sup> The decision in *Gant* placed limits on the ability of the police to conduct searches of a vehicle's passenger compartment after making a warrantless arrest. The *Belton* bright-line rule had been extensively used by police, and its demise was of great concern to the law enforcement community.

Police have used *Belton* searches in conjunction with arrests for minor traffic offenses as a key strategy in ferreting out drugs.<sup>6</sup> Officers observe a vehicle that they suspect might be involved in drugs.<sup>7</sup> They might have a hunch, or they may be relying on intelligence about the vehicle.<sup>8</sup> They follow the vehicle and then establish a pretext for pulling it over, often relying on minor traffic violations.<sup>9</sup> When officers pull over a vehicle, they speak with the driver, use their senses to look for any criminal evidence in plain view, and ask the driver for his license, registration, and proof of insurance.<sup>10</sup> If the driver is unable to produce any of these three things, an officer may place him under arrest and may search the vehicle's passenger compartment.<sup>11</sup>

Although difficult to quantify, law enforcement agents find evidence supporting drug arrests through this process often enough to create a general perception among officers that

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<sup>4</sup> 129 S. Ct. 1710 (2009).

<sup>5</sup> 453 U.S. 454 (1981).

<sup>6</sup> See Markus D. Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001); Michael C. Gizzi, *Pretextual Stops, Vehicle Searches, and Crime Control: An Examination of Strategies Used on the Frontline of the War on Drugs*, in 24 CRIMINAL JUSTICE STUDIES: A CRITICAL JOURNAL OF CRIME, LAW, AND SOCIETY (forthcoming 2011); MILTON HEUMANN & LANCE CASSAK, GOOD COP, BAD COP: RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE 70-74 (2003); Walter R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

<sup>7</sup> HEUMANN & CASSAK, *supra* note 6, at 73.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 71.

<sup>10</sup> *Id.* at 71-72.

<sup>11</sup> *Id.* at 72.

this is a highly effective tactic for drug interdiction.<sup>12</sup> However, the United States Supreme Court's decision in *Gant* places limits on law enforcement's ability to conduct these searches.

This study examines the issues raised by *Arizona v. Gant* and provides a context for understanding the importance of the *Gant* decision. The article provides an overview of the use of vehicle searches incident to arrest in the war on drugs and examines the rationale underlying the *Gant* decision, considering the implications the case raises for vehicle searches. This information provides a background for an examination of lower court decisions in the year after *Gant* was decided. A content analysis of 125 decisions by federal courts and 117 decisions by state courts has been conducted to consider the initial impact the decision is having on vehicle searches.<sup>13</sup>

#### A. VEHICLE SEARCHES INCIDENT TO ARREST

In 1969, the Supreme Court decided *Chimel v. California* and defined the scope of warrantless searches of individuals that occur incident to arrest.<sup>14</sup> An officer is permitted to search the arrestee's person and the area within the "immediate control" of the person, defined as the distance the individual could reach, in order to discover weapons or to identify evidence and prevent its concealment or destruction.<sup>15</sup> This rule was expanded by the Court's decision in *United States v. Robinson*, which ruled that after a lawful custodial arrest, a full search of the person incident to arrest was reasonable under the Fourth Amendment.<sup>16</sup> Unlike the "stop and frisk" search authorized by *Terry v. Ohio*,<sup>17</sup> the search incident to arrest is a far more invasive search.<sup>18</sup> The search incident to arrest is not limited in the scope of evidence that may be seized nor in the purpose of the search.<sup>19</sup> The only limitation is the "immediate control" standard set out in *Chimel*, which means that the entire person of the arrestee is subject to search.<sup>20</sup> While *Chimel*'s reaching distance rule seemed simple enough, it left some confusion about the permissible scope of searches incident to legal arrest when the suspect was arrested in a vehicle.<sup>21</sup> Could the search extend to the entire passenger compartment, or was it limited to the arrestee's reaching distance? In *New York v. Belton*, the Court set aside the limitations that *Chimel* placed on searches incident to arrest by establishing a bright-line rule: when an individual is arrested in a vehicle, it is reasonable for the officer to search the entire passenger compartment, including any opened or closed containers.<sup>22</sup>

<sup>12</sup> See, e.g., Charles Crawford, *Race and Pretextual Stops: Noise Enforcement in Midwest City*, 6 Soc. PATHOLOGY 213 (2000); Ilya Lichtenberg, *Driving While Black (DWB): Examining Race as a Tool in the War on Drugs*, 7 POLICE PRAC. AND RES. 49 (2006); Alberto Lopez, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads*, 90 KY. L.J. 75 (2001).

<sup>13</sup> These cases were selected using *Shepard's Citations for Arizona v. Gant*, 129 S. Ct. 1710 (2009).

<sup>14</sup> "Followed" cases were selected for analysis. In addition, seventy-two federal cases listed in *Shepard's* as "Distinguished" were examined. See *infra* Part IV for a detailed examination of the methodology used.

<sup>15</sup> 395 U.S. 752 (1969).

<sup>16</sup> *Id.* at 763.

<sup>17</sup> 414 U.S. 218, 236 (1973).

<sup>18</sup> 392 U.S. 1, 30 (1968).

<sup>19</sup> *Robinson*, 414 U.S. at 228, 234-35.

<sup>20</sup> *Id.* at 234.

<sup>21</sup> *Id.* at 235.

<sup>22</sup> A widely cited analysis of the search incident to arrest rule was highly critical of the rationale in *Chimel*: *Chimel's* justification for a search of that area appears to be based on two assumptions: (1) that the arrestee *might be inclined* to reach into that area for a weapon or evidence, and (2) that the arrestee *would be able* to reach into that area. The first assumption might be correct, but the second assumption is *not* correct. Because it is incorrect, a whole body of subsequent law has been built on a false foundation.

Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 Wis. L. REV. 657, 661 (2002).

<sup>22</sup> 453 U.S. 454, 460-61 (1981).

The "automobile exception" to the warrant requirement was first stated in the case of *Carroll v. United States* in 1925.<sup>23</sup> Under that doctrine, a warrantless search of a motor vehicle was justified when there was probable cause to suspect the presence of contraband in that vehicle.<sup>24</sup> The rationale was that the mobile nature of an automobile made requiring a warrant impractical.<sup>25</sup> The bright-line rule established in *Belton* enabled an arresting officer to conduct a search of the passenger compartment of a vehicle for any arrest made in a vehicle. In many ways, it transformed the automobile exception into a mere probable cause exception: as long as the officer had probable cause for an arrest, he or she could search the entire passenger compartment.<sup>26</sup>

In 2001, the Court ruled in *Atwater v. City of Lago Vista* that officers could impose full custodial arrest for any offense, including minor non-jailable offenses,<sup>27</sup> thus expanding the potential reach of *Belton* searches and increasing the ability of the police to use traffic enforcement as a pretext for drug enforcement efforts. In *Thornton v. United States*, the Court extended the *Belton* rule to hold that an arrestee need not even be at the vehicle at the time of the arrest; the fact that he or she was the "recent occupant" of the vehicle was sufficient to justify a search of the automobile in question.<sup>28</sup> The fact that Thornton was handcuffed and in the patrol car at the time of the vehicle search would prove to be significant given the facts and ultimate ruling in *Gant*.<sup>29</sup>

## B. PRETEXTUAL TRAFFIC STOPS AND THE WAR ON DRUGS

*New York v. Belton* changed the landscape for criminal investigations involving vehicles. When an officer makes an arrest – any arrest – he can execute a full search of the passenger compartment of the vehicle.<sup>30</sup> The development of search incident to arrest law was particularly valuable for the "war on drugs."<sup>31</sup> In the 1968 case *Terry v. Ohio*, the Supreme Court sanctioned the use of warrantless "stop-and-frisk" searches based only on an officer's "reasonable articulable suspicion."<sup>32</sup> In response, the federal government began to use criminal profiling strategies in which profiles of likely drug dealers were developed, and *Terry* stops were used to investigate potential drug couriers in the nation's airports and in train and bus stations.<sup>33</sup> These efforts were generally viewed favorably by the Supreme Court.<sup>34</sup> While using a *Terry* stop was easy enough when observing suspects disembarking airplanes or buses, it was much more difficult to develop the required reasonable suspicion when following a vehicle going sixty-five

<sup>23</sup> 267 U.S. 132, 149 (1925); see also Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 390, n.49 (2001) (discussing *Carroll* and opining that the ongoing efforts to prohibit the sale of alcohol in the 1920s is somewhat similar to the war on drugs that has resulted in broader powers of search and seizure today).

<sup>24</sup> *Carroll*, 267 U.S. at 149.

<sup>25</sup> *Id.* at 153.

<sup>26</sup> See Yale Kamisar, *Confessions, Search and Seizure, and the Rehnquist Court*, in THE REHNQUIST COURT: A RETROSPECTIVE 80, 100 (Martin H. Belsky ed., 2002).

<sup>27</sup> 532 U.S. 318, 354 (2001). The offense in this case was for violation of a mandatory safety belt use law.

<sup>28</sup> 541 U.S. 615, 622-24 (2004).

<sup>29</sup> Commentators have been clear in pointing out flaws of the *Thornton* ruling. See, e.g., Note, *Leading Case: B. Criminal Law and Procedure*, 118 HARV. L. REV. 268, 270-71 (2004), and Jason Hermele, Comment, *Arizona v. Gant: Rethinking the Evidence*, 87 DENV. U. L. REV. 175, 178-79 (2009), both of which make prominent favorable mention of Scalia's criticism of Rehnquist's rationale in *Thornton*.

<sup>30</sup> *New York v. Belton*, 453 U.S. 454, 460-61 (1981).

<sup>31</sup> SAMUEL WALKER, SENSE AND NON-SENSE ABOUT CRIME, DRUGS, AND COMMUNITIES 301-31 (7th ed. 2011)

<sup>32</sup> 392 U.S. 1, 30 (1968).

<sup>33</sup> See Philip S. Greene & Brian W. Wice, *The D.E.A. Drug Courier Profile: History and Analysis*, 22 S. TEX. L.J. 261, 265-74 (1982).

<sup>34</sup> See, e.g., *United States v. Sokolow*, 490 U.S. 1, 10 (1989); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *United States v. Mendenhall*, 446 U.S. 544, 547 (1980).

miles per hour down the highway.<sup>35</sup> Thus, in 1984, the federal Drug Enforcement Agency (DEA) came up with a strategy to get around this problem.<sup>36</sup> Under Operation Pipeline, as the DEA's effort is known, police are encouraged to employ any applicable traffic laws, and if they identify any traffic infractions, no matter how minor, the officers have probable cause to stop a vehicle.<sup>37</sup> Once the vehicle is stopped, they can observe the driver and passenger using their senses, request a driver's license and proof of insurance, and determine if any active warrants have been issued for the vehicle occupants.<sup>38</sup> If an officer has probable cause that the driver has engaged in any illegal activities, he can place the driver in custody and execute a complete search of the vehicle's passenger compartment as incident to arrest.<sup>39</sup> This has proved to be a valuable set of tools, and in the past thirty years, the DEA has trained more than 27,000 officers in effectively using these techniques.<sup>40</sup>

The key to Operation Pipeline is the use of pretextual traffic stops to conduct a drug-related criminal investigation.<sup>41</sup> Officers observe a traffic violation, which they use as the pretext for a broader investigation.<sup>42</sup> Officers can follow a vehicle until they identify a reason to stop the vehicle, and the reason may be minor.<sup>43</sup> Even if the stop is not originally a pretextual stop, the stop may escalate if the officer becomes suspicious during his interactions with the occupants of the vehicle.<sup>44</sup>

Numerous studies have shown that police officers are more likely to stop and search minority drivers,<sup>45</sup> raising concerns about discrimination through racial profiling.<sup>46</sup> However, in 1996, the Supreme Court ruled in *Whren v. United States* that while a traffic stop is a seizure under the Fourth Amendment, "as a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."<sup>47</sup> *Whren* provided law enforcement with a definitive statement that the traffic code could be used as the pretext for criminal investigations as long as the officer had probable cause for the stop.<sup>48</sup> The *Whren* decision raised questions of racial profiling in the use of vehicle stops, but the Court swept those questions aside as irrelevant under a Fourth Amendment analysis.<sup>49</sup>

<sup>35</sup> See HEUMANN & CASSAK, *supra* note 6.

<sup>36</sup> See *Operations Pipeline and Convoy*, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, <http://www.usdoj.gov/dea/programs/pipecon.htm> (last visited Jan. 26, 2011); DAVID HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2001).

<sup>37</sup> See Dubber, *supra* note 6.

<sup>38</sup> LaFave, *supra* note 6, at 1853, 1868.

<sup>39</sup> *Id.* at 1857.

<sup>40</sup> VIKAS GUMBHIR, BUT IS IT RACIAL PROFILING: POLICING, PRETEXT STOPS, AND THE COLOR OF SUSPICION 13 (2007).

<sup>41</sup> *Id.* at 14.

<sup>42</sup> *Id.* at 13-14.

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.*

<sup>45</sup> See HEUMANN & CASSACK, *supra* note 6; Craig Curtis, *Car Stereos and the Criminal Sanction: The Dangers of Too Much Social Control*, 31 NEW POL. SCI. 273, 285 (2009) (reporting significant racial disparities in impoundment provisions of vehicle noise ordinances where young male minority drivers were far more likely to have their vehicles impounded than their prevalence among drivers would suggest); Angela Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 432 (1997). See generally Robin Engel & Jennifer Calnon, *Examining the Influence of Drivers' Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 JUST. Q. 49 (2004); Robin Engel, *A Critique of the "Outcome Test" in Racial Profiling Research*, 25 JUST. Q. 1 (2008).

<sup>46</sup> See, e.g., David Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Lopez, *supra* note 12.

<sup>47</sup> 517 U.S. 806, 810 (1996).

<sup>48</sup> *Id.*

<sup>49</sup> Justice Scalia rejected *Whren*'s argument that the use of "ulterior motives" would invalidate an otherwise legal traffic stop. *Id.* at 811. After citing a series of precedents, he was emphatic in proclaiming, "[w]e think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Id.* at 813 (citing *United States v. Robinson*, 414 U.S.

**C. AN EARLY HINT OF THE VULNERABILITY OF BELTON**

In the 1998 case of *Knowles v. Iowa*, the Court ruled that when an officer chooses not to arrest an individual who commits a minor offense and instead chooses to issue a citation, the officer does not have the right to conduct a search of the individual.<sup>50</sup> The "search incident to arrest" doctrine does not apply because there is no custodial arrest. In *Knowles*, the police stopped a driver for speeding and issued him a citation.<sup>51</sup> The officer then proceeded to search the vehicle's passenger compartment, where he found marijuana and drug paraphernalia.<sup>52</sup> Iowa law permitted either an arrest or a citation for a traffic violation,<sup>53</sup> and the state argued that this allowed law enforcement to conduct a search incident to issuing a citation.<sup>54</sup> Chief Justice Rehnquist disagreed. Writing for a unanimous Court, Rehnquist reasoned that when a search incident to arrest is performed, it has two purposes: a search for weapons and a search for further evidence of the crime.<sup>55</sup> If the law permits an arrest for a citable offense and the officer chooses not to make the arrest, then there is no rationale for a search beyond officer safety.<sup>56</sup> Even if officer safety concerns were present, the search would be limited to the individual's reachable area.<sup>57</sup>

The second rationale underlying search incident to arrest is the search for more evidence related to the crime. The Court stated,

Once *Knowles* was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.<sup>58</sup>

There was no justification for a search to preserve evidence, as all of the evidence needed for the arrest was already complete; a search incident to arrest in this instance is merely an attempt to "stumble onto evidence wholly unrelated to the speeding offense."<sup>59</sup>

Rehnquist's reasoning in *Knowles* might suggest that the Court would be willing to reconsider how the search incident to arrest had been contorted by *Belton* into something that barely resembled the rationale put forth in *United States v. Robinson*.<sup>60</sup> The application of a bright line rule as laid out in *Belton* could easily result in the police engaging in full blown searches of cars stopped for a wide range of minor traffic violations. Often, the Court issues significant rulings when extreme factual situations emerge from the application of existing doctrines. For example, it was only three years later that the Court decided *Atwater*, permitting full custodial arrests for any offense, including those misdemeanors and petty offenses that were

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218 (1973); *Scott v. United States*, 436 U.S. 128 (1978); *United States v. Villamonte Marquez*, 462 U.S. 579 (1983)). While he acknowledged that the Constitution prohibits "selective enforcement of the law based on considerations such as race," he asserted, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.* at 814 nn.6-7.

<sup>50</sup> 525 U.S. 113, 117-19 (1998).

<sup>51</sup> *Id.* at 114.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 115.

<sup>55</sup> *Id.* at 116 (citing *United States v. Robinson*, 414 U.S. 218, 234 (1973)).

<sup>56</sup> *Id.* at 118.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *United States v. Robinson*, 414 U.S. 218 (1973).

not punishable by jail.<sup>61</sup> This further widened the ability of police to use vehicle searches to wage the war on drugs but also exposed the extremes to which police misconduct could be justified by existing search and seizure rules. Indeed, one of the telling features of the *Gant* decision is the total lack of any sense that the law places any restraints on them by the police at the scene.

## II. ARIZONA V. GANT: AN UNEXPECTED SHIFT IN SEARCH INCIDENT TO ARREST LAW

The facts in the case of *Arizona v. Gant* are not complex. The police in Tucson, Arizona received an anonymous tip that a residence was involved in the illegal drug trade.<sup>62</sup> Knowing that an anonymous tip alone is insufficient to detain a suspect,<sup>63</sup> the police focused their investigation on the residence.<sup>64</sup> They knocked on the door and spoke to Rodney Gant, who answered the door and identified himself, but claimed that he was not a resident of the house.<sup>65</sup> The officers withdrew, ran a background check on Gant, discovered that he had a suspended driver's license, and returned to the residence.<sup>66</sup> Gant was not there, but he drove back to the residence while the officers were present.<sup>67</sup> Having observed Gant driving and knowing that he had a suspended driver's license, the officers placed him under arrest, handcuffed him, and placed him in the back of a police cruiser.<sup>68</sup> An officer then proceeded to search Gant's car, finding a gun and cocaine.<sup>69</sup>

At trial, Gant moved to suppress the evidence of the gun and the cocaine on the basis that the police had no probable cause to search for evidence of drug trafficking and that a search of the car incident to arrest was not proper since he was completely and securely isolated from the car at the time of his arrest.<sup>70</sup> The trial court ruled for the state<sup>71</sup> but was reversed by the Arizona Court of Appeals,<sup>72</sup> which determined that the search incident to arrest was not permissible under *Belton* because "the record before us does not support a finding that the police were attempting to initiate contact with Gant while he was in the vehicle."<sup>73</sup> After the Arizona Supreme Court declined to hear the case, the State sought *certiorari* from the United States Supreme Court, which was granted in 2003.<sup>74</sup> The Supreme Court did not reach the merits, however, and remanded the case<sup>75</sup> back to the state courts for reconsideration in light of a 2003 Arizona Supreme Court case, *State v. Dean*.<sup>76</sup> The trial court refused to suppress the evidence as an unreasonable search and seizure, and Gant appealed to the Court of Appeals, which again reversed the decision.<sup>77</sup> The Court of Appeals held that the suppression was appropriate because Gant had no means of gaining access to the car at the time of the search and noted that since Gant was in handcuffs, neither of the rationales for search incident to

<sup>61</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

<sup>62</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009).

<sup>63</sup> See *Alabama v. White*, 496 U.S. 325 (1990); *Florida v. J.L.*, 529 U.S. 266 (2000).

<sup>64</sup> *Gant*, 129 S. Ct. at 1714.

<sup>65</sup> *Id.* at 1714-15.

<sup>66</sup> *Id.* at 1715.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Def.'s Mot. to Supp., *State v. Gant*, No. CR-2000-0042, 2000 WL 34566317 (Ariz. Super. Ct. Apr. 26, 2000).

<sup>72</sup> *State v. Gant*, 43 P.3d 188, 192 (Ariz. Ct. App. 2002).

<sup>73</sup> *Id.* at 194.

<sup>74</sup> *Arizona v. Gant*, 538 U.S. 976 (2003).

<sup>75</sup> *Arizona v. Gant*, 540 U.S. 963 (2003).

<sup>76</sup> 76 P.3d 429, 436-37 (Ariz. 2003) (holding that a search incident to arrest was invalid where the arrestee was not the "recent occupant" of a vehicle, and criticizing the earlier ruling in *State v. Gant*, 43 P.3d 188).

<sup>77</sup> *State v. Gant*, No. CR-230000042, 2004 WL 5588539, at \*1 (Ariz. Super. Ct. Dec. 7, 2004).

arrest was present.<sup>78</sup> The Arizona Supreme Court affirmed.<sup>79</sup> Once again, the case made its way to the Supreme Court, which granted *certiorari* in February 2008 on the question:

[whether the Fourth Amendment requires] law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured.<sup>80</sup>

*Arizona v. Gant* was argued on October 7, 2008.<sup>81</sup> Oral argument largely turned on the question of whether the two-pronged justification for search incident to arrest could support the bright-line rule established twenty-seven years earlier in *New York v. Belton*.<sup>82</sup> Thirty-three states submitted *amicus* briefs in support of the state,<sup>83</sup> and several Justices, including Scalia, Stevens, Ginsberg, and Souter, expressed disbelief that the officer safety rationale made sense as the justification for *Belton*, particularly given the facts involved in *Gant*.<sup>84</sup> Justices Breyer, Alito, and Chief Justice Roberts were the only justices to actively engage the respondent and make the case for continuing *Belton*'s bright-line rule.<sup>85</sup>

The decision that the Court handed down in April 2009 reflected the Justices' positions revealed during oral argument. Justice Stevens wrote the opinion of the Court and was joined in a 5-4 decision by Justices Souter, Ginsberg, and Thomas,<sup>86</sup> with Justice Scalia writing a separate concurrence.<sup>87</sup> Justice Breyer wrote a dissent,<sup>88</sup> and Justice Alito wrote a dissent in which Justice Kennedy and Chief Justice Roberts joined, and Justice Breyer joined in part.<sup>89</sup>

Justice Stevens was the only justice remaining from the Court that decided *New York v. Belton*, and his opinion in *Gant* is hinted at in his dissent in *Thornton v. United States*, in which he questioned the rationale of *Belton*.<sup>90</sup> Stevens viewed *Belton* as being "swollen" beyond its original intent when it was used to allow an officer to search the passenger compartment of a vehicle in which the arrestee had been merely a "recent occupant."<sup>91</sup> He accepted the use of the automobile exception if there was probable cause to search, but was troubled by the way that *Belton* had been contorted into a generally applicable tool for police to search a vehicle's passenger compartment without consideration for the legal basis for that search.<sup>92</sup>

<sup>78</sup> *State v. Gant*, 143 P.3d 379, 382-83 (Ariz. Ct. App. 2006).

<sup>79</sup> *State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007).

<sup>80</sup> *Arizona v. Gant*, 552 U.S. 1230, 1230 (2008).

<sup>81</sup> Transcript of Oral Argument, *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (No. 07-542), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-542.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-542.pdf).

<sup>82</sup> *Id.*

<sup>83</sup> Brief for State of Florida et al. as Amici Curiae Supporting Petitioner, *Arizona v. Gant*, 129 S. Ct. 1710 (2003) (No. 02-1019), 2003 WL 21648701; Brief for State of Florida et al. as Amici Curiae Supporting Petitioner, *Arizona v. Gant*, 129 S. Ct. 1710 (2003) (No. 07-542), 2008 WL 2151707.

<sup>84</sup> Transcript of Oral Argument, *Arizona v. Gant*, 129 S. Ct. 1710 (No. 07-542).

<sup>85</sup> *Id.* at 39-45.

<sup>86</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1710 (2009).

<sup>87</sup> *Id.* at 1724-25 (Scalia, J., concurring).

<sup>88</sup> *Id.* at 1725-26 (Breyer, J., dissenting).

<sup>89</sup> *Id.* at 1726-32 (Alito, J., dissenting).

<sup>90</sup> *Thornton v. United States*, 541 U.S. 615, 633-36 (2004) (Stevens, J., dissenting).

<sup>91</sup> *Id.* at 636.

<sup>92</sup> *Id.*; see also, e.g., *California v. Acevedo*, 500 U.S. 565, 599 (1991) (Stevens, J., dissenting) ("Even accepting *Belton*'s application to a case like this one, however, the Court's logic extends its holding to a container placed in the trunk of a vehicle, rather than in the passenger compartment. And the Court makes this extension without any justification whatsoever other than convenience to law enforcement."); *Wyoming v. Houghton*, 526 U.S. 295, 313 (2001) (Stevens, J., dissenting) ("Instead of applying ordinary Fourth Amendment principles to this case, the majority extends the automobile warrant exception to allow searches of passenger belongings based on the driver's misconduct. Thankfully, the Court's automobile-centered analysis limits the scope of its holding. But it does not justify the outcome in this case.").

Stevens began the Court's decision in *Gant* by confronting the shortcomings of returning to the original rationales for search incident to arrest. He argued that the primary purpose of the search was for officer safety and to ensure that the arrestee could not gain access to weapons.<sup>93</sup> The "reaching-distance" rule of *Chimel* as applied to vehicles did not support the search of *Gant*'s vehicle after he had been handcuffed and placed in the back seat of the patrol car.<sup>94</sup> Moreover, the second rationale for searches incident to arrest also did not apply, as a search for evidence related to the crime could only be used when it was reasonable to assume that evidence supporting the arrest might be found in the vehicle.<sup>95</sup> Given that *Gant* was arrested for driving under a suspended license, this was not reasonable.<sup>96</sup>

*Belton* had been expanded in such a way that it was disconnected from its original rationale. Stevens quoted Justice O'Connor's concurrence in *Thornton*, in which she stated, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*."<sup>97</sup> Even the officer who searched *Gant*'s vehicle noted that he conducted the search "because the law says we can do it."<sup>98</sup> The bright-line rule in *Belton* was designed to provide officers with maximum efficiency in conducting their work, yet it did so by disregarding the constitutional rationale for the search in the first place.<sup>99</sup> Stevens challenged the *Thornton* holding that allowed police to search the vehicle recently occupied by an arrestee, even though "most of the time the vehicle would not be within the arrestee's reach at the time of the search."<sup>100</sup> He rejected the broad reading of *Belton*, and held that *Chimel v. California* provides the proper standard for vehicle searches incident to arrest.<sup>101</sup> The *Chimel* rationale "authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."<sup>102</sup>

In order to gain the crucial fifth vote for a majority, Stevens acceded to Justice Scalia's desire to allow a search of a vehicle under the circumstances when "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."<sup>103</sup> This would not permit a search in cases like *Gant*'s where the arrest was for a minor traffic violation, but it would have supported the searches in *Belton* and in *Thornton* where the initial arrests were drug-related; thus, it would be reasonable for officers to conclude that further evidence of that crime might be found in the passenger compartment.

In his concurring opinion, Justice Scalia rejected Stevens' reliance on *Chimel* and argued that the only rationale for a vehicle search incident to arrest is where it is reasonable to believe evidence related to the crime of arrest would be found.<sup>104</sup> Scalia believed that the officer safety rule left too much room for manipulation by officers.<sup>105</sup> Yet, because no other member of the Court shared his view about *Chimel*, Scalia chose to join the majority in order to avoid what he

<sup>93</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009).

<sup>94</sup> *Id.* at 1719.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* ("Whereas *Belton* and *Thornton* were arrested for drug offenses, *Gant* was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of *Gant*'s car.").

<sup>97</sup> *Gant*, 129 S. Ct. at 1718 (quoting *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part)).

<sup>98</sup> *Id.* at 1715.

<sup>99</sup> *Id.* at 1723 (citing *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).

<sup>100</sup> *Id.* at 1719.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (citing *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

<sup>104</sup> *Id.* at 1724-25 (Scalia, J., concurring).

<sup>105</sup> *Id.*



viewed as "plainly unconstitutional searches" under the *Belton* standard.<sup>106</sup> While the two pronged ruling that emerged – permitting searches of the defendant's "reaching distance" when not secured or full passenger compartment searches when it is reasonable to believe that the search will yield further evidence of the crime of arrest – is more accommodating to police than Stevens' sole opinion would have been, the Stevens/Scalia rationale places significant limits on the police to conduct vehicle searches incident to a legal arrest.

Writing in dissent, Justice Alito argued that the majority had in fact overruled *Belton* even though it claimed only to be modifying it.<sup>107</sup> Alito challenged the majority for abandoning *stare decisis* in an area of the law in which there has been substantial reliance by law enforcement on the rule set forth in *Belton*, stating, "[t]he *Belton* rule has been taught to police officers for more than a quarter century."<sup>108</sup> This was also the stated rationale for Justice Breyer's dissent, in which he acknowledged Stevens' concerns about the problems of unconstitutional searches but believed that great weight had to be given to the *Belton* precedent that had been recently reaffirmed in *Thornton* and had been relied on for the past twenty-eight years.<sup>109</sup>

Alito further argued that *Belton* has been a workable rule, and there have been no circumstances that have occurred which would bring the decision's rationale into question.<sup>110</sup> He challenged the Court's claim that the reasoning in *Belton* was flawed, arguing that the reliance on *Chimel* is flawed, and that the *Belton* Court could not have assumed that the search would occur before the arrestee was placed in custody.<sup>111</sup> It was enough for Alito that at the time of the arrest the suspect was near their vehicle, the suspect would then be secured, and the search could proceed safely.<sup>112</sup> Alito also questioned Justice Scalia's "reasonable to believe" standard, wondering why a "reasonableness" standard would be used, rather than a probable cause standard.<sup>113</sup>

### III. THE IMPLICATIONS OF *GANT* FOR THE FUTURE OF VEHICLE SEARCHES

*Arizona v. Gant* could fundamentally reshape the law of search incident to arrest. The bright-line rule from *New York v. Belton* seems to have been abandoned. Officers may no longer search the passenger compartment of a vehicle incident to arrest unless they have reason to believe that the arrestee will be able to gain access to the vehicle at the time of the search.<sup>114</sup> In that instance, the "reachable-distance" rule of *Chimel v. California* determines the scope of a permissible search.<sup>115</sup> A search can also be conducted if the officer has reasonable belief that the vehicle contains further evidence of the crime for which the suspect was arrested.<sup>116</sup> For arrests stemming from minor traffic violations, this precludes a vehicle search.<sup>117</sup> The reaction from the law enforcement community, at least as evidenced by such publications as the *FBI Law Enforcement Bulletin*<sup>118</sup> and *Police Chief*,<sup>119</sup> suggests that *Gant* is perceived as a significant ruling for day-to-day law enforcement operations.

<sup>106</sup> *Id.* at 1725.

<sup>107</sup> *Id.* at 1726 (Alito, J., dissenting).

<sup>108</sup> *Id.* at 1728 (Alito, J., dissenting).

<sup>109</sup> *Id.* at 1725-26 (Breyer, J., dissenting).

<sup>110</sup> *Id.* at 1729 (Alito, J., dissenting).

<sup>111</sup> *Id.* at 1730-31.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1731.

<sup>114</sup> *Id.* at 1723-24.

<sup>115</sup> *Id.* at 1723.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1719.

<sup>118</sup> Richard G. Schott, *The Supreme Court Reexamines Search Incident to Lawful Arrest*, 78 *FBI Law Enforcement Bulletin* 22 (2009).

<sup>119</sup> Lisa A. Judge, *Bye-Bye Belton? Supreme Court Decision Shifts Authority for Vehicle Searches from Automatic to Manual*, *POLICE CHIEF MAG.*, June 6, 2009, available at

For twenty-eight years, the bright-line rule from *Belton* governed searches incident to arrest occurring in the context of a traffic stop. In many ways, Justice O'Connor's comments in *Thornton* were accurate in that police have viewed the tool of search incident to arrest as an entitlement. Pretextual stops were an essential tool in the war on drugs and in many other types of criminal investigations. Police officers knew that all they had to do was to establish probable cause for an illegal act based on whatever information they had. They could then stop a suspect's vehicle on the pretext of a minor traffic offense, place the driver under arrest, and proceed to conduct a complete search of the passenger compartment. Thus, the decision in *Gant* represents what could be a paradigm shift for law enforcement, at least with regard to automobile searches.

A few months after the *Gant* decision, both the *FBI Law Enforcement Bulletin*<sup>120</sup> and *Police Chief*<sup>121</sup> had articles focusing on the implications of the decision. The Federal Law Enforcement Training Center issued a ten-page report on the decision to educate law enforcement officers on how the decision changed protocol in the context of investigatory traffic stops.<sup>122</sup> Perhaps more importantly, the article provided a list of five vehicle search exceptions that officers can use in specific circumstances and still comply with the strictures of the Fourth Amendment.<sup>123</sup> First, if there is reasonable suspicion that a passenger or recent occupant is dangerous and might be able to gain access to the vehicle, the officer can "frisk the passenger compartment for weapons."<sup>124</sup> This suggests that the search would be permissible even if the driver is secured and under arrest if other recent occupants are not under the control of the officer. Second, an officer may search a vehicle if he has reasonable belief that "the vehicle contains evidence of criminal activity."<sup>125</sup> Such a search is implied by Justice Scalia's reasonable belief standard of finding evidence of criminal activity related to the arresting offense. Third, an officer can conduct a protective sweep of a vehicle if he or she has reasonable suspicion that a dangerous person is hiding therein.<sup>126</sup> This search would be limited to looking in places where such a person might be hiding, but it would not allow a full search of all containers in the vehicle.<sup>127</sup> Fourth, the officer can search the vehicle if he or she gains consent to do so.<sup>128</sup> Finally, if the officer chooses to lawfully impound the vehicle after an arrest, this would enable an inventory search for administrative purposes; if performed legally, an inventory search would permit any contraband to be seized.<sup>129</sup> These same "tips" were reproduced in the June 2009 issue of *Police Chief*.<sup>130</sup>

Of these exceptions, consent and inventory searches are particularly important. Many police officers believe they can convince almost anyone to consent to a search; thus, it is a logical implication of *Gant* that officers will seek to obtain consent to search in cases in which they could previously conduct a search incident to arrest. As long as consent is given voluntarily, the Court has held that a consent search is legal.<sup>131</sup> Consent for a search does not require the officer to arrest the individual.<sup>132</sup> For example, when someone is issued a summons for failure to

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[http://policechiefmagazine.org/magazine/index.cfm?fuseaction=print\\_display&article\\_id=1811&issue\\_id=6](http://policechiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=1811&issue_id=6) 2009.

<sup>120</sup> Schott, *supra* note 118.

<sup>121</sup> Judge, *supra* note 119.

<sup>122</sup> Jennifer G. Solari, *The United States Supreme Court's Ruling in Arizona v. Gant: Implications for Law Enforcement Officers*, FED. LAW ENFORCEMENT INFORMER, May 2009, at 3, 3-8.

<sup>123</sup> *Id.* at 8.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See Judge, *supra* note 119.

<sup>131</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

<sup>132</sup> *Id.* at 277.

show proof of insurance, the police officer could simply ask the driver to consent to a search of the vehicle. However, if for the same offense the officer placed the driver under arrest and then asked the arrestee to search the vehicle as a condition of releasing him, a court would likely interpret this behavior as coercive, thus invalidating the voluntariness of consent.

The last search exception discussed in the Federal Law Enforcement Training Center report is the inventory search.<sup>133</sup> An inventory search is an administrative search conducted when a vehicle has been lawfully impounded.<sup>134</sup> The purpose of this type of search is to inventory the contents of a vehicle and protect the police from claims that valuable items in the vehicle were stolen when it was in the impound system.<sup>135</sup> If in the course of inventorying a vehicle, the police discover illegal contraband or evidence of a crime, that evidence is admissible in court.<sup>136</sup> As the report suggests, if the law permits the use of impoundment, this may be a way to accomplish a full vehicle search.<sup>137</sup> It is unclear how the Court would respond to this back-door method to circumvent *Gant*'s restrictions, but the Court has been willing to limit the scope of inventory searches in the past.<sup>138</sup> As Chief Justice Rehnquist said in his majority opinion affirming the suppression of evidence in *Florida v. Wells*, "[o]ur view that *standardized criteria* . . . must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."<sup>139</sup> Thus, if an agency has a standing policy to impound any vehicle where an arrest occurs on the street, then it is likely that this exception would be acceptable. But if an agency rarely or never impounds vehicles as a matter of practice, then the shift to impoundment in light of *Gant* might be viewed as an attempt to violate the spirit of the decision.

#### IV. THE JUDICIAL IMPACT OF ARIZONA V. GANT

The impact of the *Gant* decision on law enforcement search practices will only become clear once time has passed for lower courts to flesh out their interpretations of the decision. Additionally, it will take time for law enforcement to adapt their practices to the new rules. While any examination of the impact of *Arizona v. Gant* after one year is by its very nature preliminary, there are important indicators present that suggest that the Court's decision is significant.

##### A. RESEARCH METHOD

In order to consider the impact of the *Gant* decision, every lower federal court decision citing *Gant* in *Shepard's Citations* from April 22, 2009, through September 30, 2010, was read and analyzed. The decisions were read and coded to present a quantitative picture of the issues that have been raised in the year following the ruling and to examine the substantive impact of the decision in terms of the resolution of cases. *Shepard's* was used as the primary means of identifying lower court decisions responding to the *Gant* decision because it is the most comprehensive data source available to identify court decision citations to pre-existing cases.<sup>140</sup>

<sup>133</sup> Solari, *supra* note 122, at 8.

<sup>134</sup> See *Florida v. Wells*, 495 U.S. 1, 4-5 (1990); *Colorado v. Bertine*, 479 U.S. 367, 372 (1988); *South Dakota v. Opperman*, 428 U.S. 364, 369-70 (1976).

<sup>135</sup> *Bertine*, 479 U.S. at 372; *Opperman*, 428 U.S. at 369.

<sup>136</sup> *Opperman*, 428 U.S. at 371-73.

<sup>137</sup> Solari, *supra* note 122, at 8.

<sup>138</sup> See *Wells*, 495 U.S. at 4.

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> THOMAS G. HANSFORD & JAMES F. SPRIGGS, II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 45-50 (Princeton Univ. Press 2008) (2006) (finding that *LEXIS Shepard's Citations* is a reliable and valid tool for judicial impact studies).

For the analysis conducted here, all cases that were listed by Shepard's as "followed by" federal courts or state courts were examined. In addition, the seventy-two Federal cases that were listed as "distinguished by" in Shepard's were examined separately. Cases that only cited *Gant*, and provided no analysis, were excluded. Tables 1 and 2 provide a detailed breakdown for the courts that rendered these decisions.

Content analysis was conducted after reading each decision. Cases were coded for whether the state or defendant won in the ruling, the presence of inventory searches, consent searches, the reason for the arrest, and the rationale for the decision. For the reason for the arrest, cases were coded as either minor traffic violation, driving with suspended license, drug arrest, warrant, possession of firearm, and other. The rationale for the decision was coded under the two prongs of the *Gant* ruling, including cases in which there was no justification for a search (e.g., minor traffic offenses, driving under a suspended/revoked license, warrants for failure to appear for minor offenses) and cases where a search was justified by a reasonable search for further evidence of the crime for which the arrest was made. These included drug arrests, officer safety claims based on the presence of firearms or weapons, and other reasons where courts believed it reasonable for further evidence to be found through a search. In addition, cases were coded if they were justified by the automobile exception, valid consent search, or a good faith exception to *Gant*.

## B. RESULTS

Shepard's Citations reports that in the eighteen months since *Gant* was decided, the case has been cited by 814 lower federal and state courts. The number of cases making reference to *Gant* has increased by approximately forty cases each month. Of the cases in which Shepard's indicated there was "analysis", 242 cases have followed the decision, 138 have distinguished it, and three have criticized it.<sup>141</sup> The sheer number of citations to *Gant* in such a short time period is significant. A separate analysis of citations to Supreme Court search and seizure cases since 1953 shows that *Gant* is ranked forty-second among all search and seizure cases in terms of the number of citations by lower courts.<sup>142</sup>

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<sup>141</sup> *Arizona v. Gant*, 129 S. Ct. 1710 (available at LEXIS, *Shepardize*, original search and *shepardization* of cases citing completed Oct. 22, 2010).

<sup>142</sup> The author *shepardized* all 298 search and seizure opinions found in the Supreme Court database and ranked these decisions by total number of lower court citations. As of Sept. 2010, *Gant* ranks among the top fifteen percent of all search and seizure cases decided since 1953. Michael C. Gizzi, William R. Wilkerson, and R. Craig Curtis, *What Makes a Landmark Case or Major Opinion? Examining Citation Patterns in Search and Seizure Cases* (Apr. 2011) (unpublished manuscript, presented at the annual meeting of the Midwest Political Science Association) (on file with author).

**Table 1. Followed and Distinguished Cases in Federal Court  
April 22, 2009 – September 30, 2010<sup>143</sup>**

	<b>Followed Cases</b>			<b>Distinguished Cases</b>	
<b>Circuit</b>	<u>Court of Appeals</u>	<u>District Court</u>		<u>Court of Appeals</u>	<u>District Court</u>
1	0	1		0	0
2	0	7		0	2
3	2	9		0	3
4	4	8		3	12
5	0	5		2	4
6	4	21		2	9
7	0	8		2	5
8	6	18		0	8
9	9	10		1	9
10	1	3		0	3
11	1	6		1	6
DC	2	0		0	0
<b>Total</b>	29	96		11	61

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<sup>143</sup> SOURCE: *Shepard's Citations*, compiled by the authors.

**Table 2. Followed Decisions in State Courts  
April 22, 2009 – September 30, 2010<sup>144</sup>**

State	<u>Lower Court</u>	<u>Supreme Court</u>	<u>Total</u>
California	1	0	1
Colorado	1	2	3
District of Columbia	2	0	2
Florida	4	0	4
Georgia	3	0	3
Idaho	2	1	3
Illinois	3	1	4
Indiana	3	0	3
Kansas	5	1	6
Kentucky	3	2	5
Louisiana	3	1	4
Maryland	1	0	1
Michigan	2	0	2
Missouri	3	0	3
North Carolina	3	0	3
New York	3	0	3
Ohio	12	0	12
Oklahoma	1	0	1
South Carolina	1	0	1
Tennessee	1	0	1
Texas	11	0	11
Utah	2	1	3
Virginia	5	0	5
Washington	25	4	29
Wisconsin	3	1	4
Total	103	14	117

<sup>144</sup> SOURCE: *Shepard's Citations*, compiled by the authors.

## 1. Federal Court Decisions

Of the 125 "followed by" cases in Federal Court, the defendant had a positive result (defined as either having a search suppressed or a ruling favorable to their position) in 29.6 percent of the cases (n=37). Seventeen cases involved instances where the defendant was arrested for driving without a license or with a suspended license. For example, in one Fourth Circuit case,

[the defendant] was handcuffed and secured in the patrol car when Officer Czernicki searched the Cadillac and found the drugs. Thus, the Cadillac's passenger compartment was not "within [the defendant's] reach at the time of the search." Moreover, the officer would not have had a reasonable basis to believe he would find evidence of [the defendant's] license suspension – the offense of arrest – within the Cadillac's passenger compartment.<sup>145</sup>

One case had evidence suppressed because the initial arrest was for reckless driving.<sup>146</sup> There were another six cases where the court found no reasonable basis for a search for evidence of the crime of arrest, including a minor warrant,<sup>147</sup> and one case where the suspect was arrested on a warrant for domestic abuse.<sup>148</sup>

One search was invalidated because the arrest was for resisting arrest and battery upon a peace officer.<sup>149</sup> The court argued that,

[i]n this case, neither the officer safety nor the evidentiary preservation justifications for a search incident to arrest supports the search of [the defendant's] car. At the time of the search, [the] defendant . . . had fled from the car, eluded police offices, and jumped over a fence. He was nowhere near the car after he fled the scene and jumped the fence . . . . [E]ven if [the defendant] had returned to the vicinity of the car, he would not have had access to the backpack or the gun as it was under [another person's] 'dominion and control.' Moreover, akin to traffic-related offenses, it is generally unlikely that an officer could reasonably expect to find evidence of the crimes of battery upon an officer or resisting arrest within a car.<sup>150</sup>

In two cases, the defendant won because courts found that an invalid inventory search was conducted by officers, who failed to follow the Supreme Court's requirements that agencies employing inventory searches have standardized procedures.<sup>151</sup> For example, in one case it was argued,

[i]t was never established that the Spink County training of its law enforcement officers suggested or required that their standard practice should be to open any closed containers as a part of an inventory search. There was no standardized procedure in this regard in Spink County and the written policy does not state that closed containers should be opened during the inventory search.<sup>152</sup>

<sup>145</sup> United States v. Majette, 326 F. App'x 211, 212-13 (4th Cir. 2009).

<sup>146</sup> United States v. Lopez, 567 F.3d 755, 756 (6th Cir. 2009).

<sup>147</sup> United States v. Westerman, No. 1:09-cr-8-WSD, 2009 U.S. Dist. LEXIS 123601, at \*3-5 (N.D. Ga. Oct. 1, 2009) (finding no basis for a search incident to arrest when the defendant was stopped for a minor traffic infraction and was subsequently arrested based on an outstanding warrant for probation violation).

<sup>148</sup> United States v. Megginson, 340 Fed. App'x 856, 857 (4th Cir. 2009).

<sup>149</sup> United States v. Chavez, No. 2:09-cr-0033, 2009 U.S. Dist. LEXIS 116924, at \*13-14 (E.D. Cal. Nov. 24, 2009).

<sup>150</sup> *Id.*

<sup>151</sup> United States v. Jackson, No. 1:07-CR-016, 2010 U.S. Dist. LEXIS 1699, at \*9 (S.D. Ohio Jan. 11, 2010); United States v. Sullivan, No. CR 09-40043, 2009 U.S. Dist. LEXIS 59934, at \*1-3 (D.S.D. July 13, 2009).

<sup>152</sup> *Sullivan*, 2009 U.S. Dist. LEXIS 59934, at \*1.

In one case, questioning done as part of an inventory search was ruled to be a violation of the defendant's *Miranda* rights:

Although a question concerning the possession of "valuables" may have been proper for inventory purposes, the trooper should have known that inquiring about a "large amount of U.S. currency and/or guns" was reasonably likely to elicit an incriminating response from a suspect . . . .<sup>153</sup>

Finally, in two cases, courts allowed plea agreements that were made prior to the *Gant* decision to be revoked so questions of invalid searches could be considered.<sup>154</sup>

The government won in eighty-three cases where *Gant* was followed. Here there were several interesting findings. Almost half of the cases involved arrests for drug offenses. In twenty cases, the defendant was arrested for drug-related offenses, and vehicle searches were justified by the "reasonable evidence of the crime" prong under *Gant*. For example, in the case of *United States v. Bell*, the court found,

[t]he police could reasonably believe that evidence of Bell's drug offense was in the car. Bell had apparently sold the drugs inside the car, and had driven the car to and from the sale site. Under *Gant*'s second prong, the authority to search extends to containers in the passenger compartment if the police reasonably believe that evidence of the suspected crime may be found therein.<sup>155</sup>

Two cases involved drug paraphernalia or illegal weapons found during the search of the person incident to arrest, which justified the search of the vehicle.<sup>156</sup> Eight cases were won by the state where the officer obtained consent for a search, and the courts ruled that consent was properly obtained.<sup>157</sup>

Eighteen cases involved application of the automobile exception due to the existence of probable cause that contraband was in the car.<sup>158</sup> For example, in a case where the suspect was arrested for possession of illegal firearms, the district court ruled that "because the officers had probable cause to believe that [the defendant's] car contained evidence of crimes, the well-recognized automobile exception to the warrant requirement alleviates any Fourth Amendment concerns."<sup>159</sup> In another automobile exception case, the district court used the automobile exception to make the argument,

[c]onsidering the totality of the circumstances, including the officers' prior knowledge of Defendant, the presence of numerous air fresheners, Defendant's unusual behavior, and [the drug dog's] positive alert, the Court concludes that probable cause existed to search Defendant's vehicle for evidence of narcotics possession and/or trafficking.<sup>160</sup>

In this case, the defendant was arrested on an outstanding warrant for a traffic violation.<sup>161</sup>

<sup>153</sup> *United States v. Vega*, No. C-09-064, 2009 U.S. Dist. LEXIS 49614, at \*13 (S.D. Tex. June 11, 2009).

<sup>154</sup> *United States v. Amos*, No. 3:08-CR-145, 2010 U.S. Dist. LEXIS 515, at \*21 (E.D. Tenn. Jan. 5, 2010); *United States v. Avendano*, 373 Fed. App'x 683 (9th Cir. Apr. 1, 2010).

<sup>155</sup> 343 Fed. App'x 72, 74 (6th Cir. 2009).

<sup>156</sup> See *United States v. Hunter*, 333 Fed. App'x 920, 925-26 (6th Cir. 2009); *United States v. Garibay*, 334 Fed. App'x 91, 93 (9th Cir. 2009).

<sup>157</sup> See *id.*

<sup>158</sup> Another 12 automobile exception cases were included among the 72 federal cases that Shepard's identified as "distinguishing."

<sup>159</sup> *United States v. Cowart*, No. 1:08-cr-10119, 2009 U.S. Dist. LEXIS 49366, at \*38 (W.D. Tenn. June 5, 2009).

<sup>160</sup> *United States v. Toliver*, No. 09-20503, 2010 U.S. Dist. LEXIS 6442, at \*11-12 (E.D. Mich. Jan. 27, 2010).

<sup>161</sup> *Id.* at \*2.



Two circuits established a "good faith" exception for cases in which the searches occurred before the decision in *Gant* was handed down. In *United States v. McCane*,<sup>162</sup> the Tenth Circuit used the precedent of *United States v. Leon*<sup>163</sup> to establish a good faith exception for *Belton* searches conducted before the ruling in *Gant*. The Eleventh Circuit established a good faith exception in March 2010 in *United States v. Mitchell*.<sup>164</sup> In the months immediately following the *Gant* decision, the Eighth Circuit refused to consider a good faith exception,<sup>165</sup> but in December 2009, an Eighth Circuit District Court in Nebraska used the good faith exception to uphold a search.<sup>166</sup> The Tenth Circuit decision in *McCane* has created a circuit conflict with the Ninth Circuit, which rejected a good faith exception claim in *United States v. Gonzalez*.<sup>167</sup> In *United States v. Casper*, the Fifth Circuit remanded a case to the District Court for an evidentiary hearing on inevitable discovery, but did not rule on the government's claim of a good faith exception.<sup>168</sup> One District Court in the Fourth Circuit used a good faith exception to invalidate a pro-defendant ruling.<sup>169</sup> The Supreme Court has recently granted certiorari on the issue of good faith exceptions to the exclusionary rule in cases where searches were authorized by precedent at the time of the search, but later invalidated.<sup>170</sup>

Finally, there were twenty-five cases the government won that raised issues involving inventory searches. There were two cases where courts ruled that inventory searches were invalid for failure of the agency to demonstrate routine practice or policy.<sup>171</sup> There were an additional three cases where an invalid inventory search was not viewed as sufficient to suppress evidence, due to outside factors including exigent circumstances involving concerns for officer safety during transportation of property, the use of the automobile exception, and consent provided for a search.<sup>172</sup> In examining inventory search cases, the record only indicated one case where a magistrate-judge actually reviewed department policies to make the determination of whether officers were entitled to impound vehicles and conduct inventory searches.<sup>173</sup> There were also cases where it was unclear from the record whether an inventory search occurred, but where the court accepted an "inevitable discovery" argument. For example, the Seventh Circuit stated,

[O]bviously, the arresting officers would not have allowed the truck to just sit on the street after [the driver] was carted away. What they would have done, in all likelihood, was impound the truck and have it towed away. An inventory search would have naturally followed; the evidence would have been inevitably discovered.<sup>174</sup>

## 2. STATE COURT DECISIONS

<sup>162</sup> 573 F.3d 1037, 1042 (2009).

<sup>163</sup> 468 U.S. 897, 922-23 (1984).

<sup>164</sup> 374 Fed. App'x 859, 867 (11th Cir. 2010).

<sup>165</sup> *United States v. Hrasky*, 567 F.3d 367, 369 (11th Cir. 2009).

<sup>166</sup> *United States v. Gray*, No. 4:09CR3089, 2009 U.S. Dist. LEXIS 113436, at \*15-16 (D. Neb. Dec. 7, 2009).

<sup>167</sup> 578 F.3d 1130, 1133 (9th Cir.2009).

<sup>168</sup> 332 Fed. App'x 222, 223 (5th Cir. 2009).

<sup>169</sup> *United States v. Southerland*, No. 7:09-CR-68-1FL, 2009 U.S. Dist. LEXIS 119851, at \*10 (E.D.N.C. Nov. 13, 2009).

<sup>170</sup> *Davis v. United States*, 131 S. Ct. 502 (2010) (oral argument scheduled for March 21, 2011).

<sup>171</sup> *United States v. Jackson*, No. 1:07-CR-016, 2010 U.S. Dist. LEXIS 1699, at \*7, 11 (S.D. Ohio Jan. 11, 2010); *United States v. Sullivan*, No. CR 09-40043, 2009 U.S. Dist. LEXIS 59934, at \*1-2 (D.S.D. July 13, 2009).

<sup>172</sup> *United States v. Morillo*, No. 08 CR 676 (NGG), 2009 U.S. Dist. LEXIS 94396, at \*21-23 (E.D.N.Y. Oct. 9, 2009); *United States v. Mitran*, No. 08-760-1/08-760-2, 2009 U.S. Dist. LEXIS 63890, at \*39-40 (E.D. Pa. July 23, 2009); *United States v. Scott*, No. 09 CR 331 (HB), 2009 U.S. Dist. LEXIS 52431, at \*28-34 (S.D.N.Y. June 8, 2009).

<sup>173</sup> *United States v. Sprecht*, No. 8:09CR101, 2009 U.S. Dist. LEXIS 99759, at \*3 (D. Neb. Oct. 26, 2009).

<sup>174</sup> *United States v. Stotler*, 591 F.3d 935, 940 (7th Cir. 2010).

There have been 117 cases in which *Gant* was followed by state courts. Nine state supreme courts have handed down fourteen decisions that involved *Gant* issues in the past year. There were 103 lower court decisions in twenty-five state courts. Unlike federal court, where defendants won in 29 percent of cases, in state courts, defendants won in 56.4 percent ( $n = 66$ ) of all cases.<sup>175</sup> While cases have been decided in twenty-five states, almost 40 percent of existing decisions were from three states: Washington ( $n=29$ ), Ohio ( $n=12$ ), and Texas ( $n=11$ ). The defendant won in 21 of 29 (72.4 percent) cases in Washington, 50 percent in Ohio, and 36 percent of cases in Texas. Yet, even with those cases removed from the database, the defendant won in 51 percent of all other state court decisions.

State supreme court rulings in nine states ruled for the defendant in 11 of 14 cases (78.5 percent). Perhaps the most interesting of the decisions by state supreme courts is *State v. Henning*, in which the Kansas Supreme Court ruled that the state's search incident to arrest law was unconstitutional under *Gant*.<sup>176</sup> Two state supreme courts have considered good faith exceptions for *Gant* cases. The Colorado Supreme Court rejected a good faith exception.<sup>177</sup> The Utah Supreme Court established a good faith exception in *State v. Baker*, but excluded evidence of the vehicle search for other reasons.<sup>178</sup> The Court ruled that a vehicle search that would be unconstitutional under *Gant* was protected by good faith exception of *Leon*, but because the officers lacked "reasonable articulable suspicion that the passengers posed a threat to their safety at the time they conducted the pat-down search," the evidence was suppressed.<sup>179</sup> The District of Columbia Court of Appeals also considered a good faith exception for *Gant* cases, but rejected it.<sup>180</sup> The Illinois and Washington Supreme Courts handed down decisions favorable to the defendant under *Gant*.<sup>181</sup> The Delaware and Kentucky Supreme Courts have decided *Gant* cases favorable to the state: Delaware used the automobile exception to justify a search,<sup>182</sup> while Kentucky used the "reasonable evidence" prong.<sup>183</sup>

When examining state court decisions involving *Gant*, there are several interesting findings. First, there were more cases where the arrest began with a minor traffic offense than in Federal Court. Fifteen cases involved arrests for offenses where it was not reasonable to believe further evidence of the crime would be found in a search. These included seventeen arrests for driving under a suspended license, two active warrants, and one for violation of a protective order. Two searches were suppressed for invalid inventory searches, where there were no standard operating procedures in place. Two cases involved frisks that were ruled unreasonable searches, and two courts ruled that there was no plain view of evidence of a crime. Four cases were ruled to be unreasonable seizures, where there was no articulable suspicion for the initial detention. Another four cases were remanded to lower courts for hearings consistent with *Gant*.

In the forty-eight lower state court cases where searches were upheld, the majority were for instances in which it was reasonable to believe that a search would reveal further evidence of the crime. These included fourteen cases where drugs or drug paraphernalia were in plain view, or where the defendant admitted to drug use. Two cases involved arrests for DUI,<sup>184</sup> and there were four additional cases that fell under the second prong of *Gant*, including cases where weapons were found and where stolen items were in plain view.<sup>185</sup> Four appeals were

<sup>175</sup> A full comparison of the differences between federal and state courts is the subject of on-going research by the authors, but is beyond the scope of this paper.

<sup>176</sup> 209 P.3d 711, 720 (Kan. 2009).

<sup>177</sup> *Perez v. People*, 231 P.3d 957, 962 (Colo. 2010).

<sup>178</sup> 229 P.3d 650, 663 (Utah 2010).

<sup>179</sup> *Id.* at 668.

<sup>180</sup> *United States v. Debruhl*, 993 A.2d 571, 573 (D.C. 2010).

<sup>181</sup> *People v. Bridgewater*, 918 N.E.2d 553, 557-58 (Ill. 2009); *State v. Patton*, 219 P.3d 651, 658 (Wash. 2009).

<sup>182</sup> *Hall v. State*, 981 A.2d 1106, 1112-13 (Del. 2009).

<sup>183</sup> *Owens v. Commonwealth*, 291 S.W.3d 704, 708 (Ky. 2009).

<sup>184</sup> *State v. Cantrell*, 233 P.3d 178 (Idaho Ct. App. 2010); *People v. Mason*, 935 N.E.2d 130 (2010).

<sup>185</sup> See, e.g., *Bishop v. State*, 308 S.W.3d 14 (Tex. App. 2009).

rejected as improvidently granted, due to the defendant not raising a suppression motion in the original action. Courts in five states issued rulings establishing a good faith exception, although one has been overruled by the state supreme court.<sup>186</sup> While one court in Washington established a good faith exception,<sup>187</sup> other Washington state courts ruled on *Gant* issues in another twenty-one cases.

## V. CONCLUSION

The review of lower court decisions involving *Gant* issues in the year following the decision provide evidence that the case is having an impact on police vehicle search practice. Out of 125 federal cases where *Gant* was the controlling factor, almost 30 percent resulted in rulings favorable to defendants. Defendants fared even better in state court decisions, where courts ruled in their favor 56 percent of the time. While it is difficult to compare the number of cases in which a defendant won prior to *Gant*, given that the *New York v. Belton* "bright line rule" permitted vehicle searches after all arrests made in a vehicle, it is highly unlikely that defendants would have evidence suppressed after a vehicle search, and even less likely that they would prevail, since the success rate currently sits between 30 and 50 percent. As Justice O'Connor pointed out in *Thornton*,<sup>188</sup> police viewed *Belton* as an entitlement, and there is ample evidence to demonstrate that law enforcement agents routinely use pretextual traffic stops as a means to execute a vehicle search after making a minor arrest. For these cases, where individuals are arrested for driving under a suspended license, driving without proof of insurance, and a host of other offenses where there is no reasonable basis for arguments of officer safety or the need to find additional evidence of the crime, it is likely that police will be forced to find other methods.

*Gant* leaves officers with several alternatives in these types of cases. First, they can try to obtain consent to conduct a search. If they can demonstrate that consent is obtained voluntarily and there is no evidence of coercion, it is likely to pass constitutional muster. Yet, even here, officers need to be careful in how they proceed. Out of nine consent cases included in this study, two searches were ruled improper by lower courts. Second, the automobile exception remains a viable search option where officers can demonstrate probable cause of evidence of criminal activity.<sup>189</sup> That can be obtained under the plain view doctrine (e.g., smelling alcohol or marijuana, viewing open bottles in the back seat) or through use of a K-9 unit to conduct a dog sniff.<sup>190</sup>

As the review of decisions demonstrates, the automobile exception (present in seven federal and one state decision) is still a viable option for officers. Third, when officers can legitimately make officer safety claims or demonstrate reasonable suspicion of the presence of weapons, officers may be able to search the vehicle to do a protective sweep. While only three cases in this review involved such facts, it is by no means prohibited.

When departments have written policies or established routine practices, they can impound vehicles and then conduct an inventory search. Of the available options, this is perhaps the most suspect because the purpose of an inventory search should not be a fishing expedition to find criminal activity. Adding further support to the idea that suspect motives may be behind inventory searches, the author of the *FBI Bulletin's* advice regarding inventory searches stated that the purpose behind the advice was to find a way "around" *Gant*.<sup>191</sup> Yet, as the review of cases here suggests, courts may be unwilling to invalidate the use of inventory

<sup>186</sup> *People v. Chamberlain*, 229 P.3d 1054, 1058 (Colo. 2010).

<sup>187</sup> *State v. Riley*, 225 P.3d 462 (Wash. Ct. App. 2010).

<sup>188</sup> *Thornton v. United States*, 541 U.S. 615, 624 (O'Connor, J., concurring in part).

<sup>189</sup> See *United States v. Ross*, 456 U.S. 798 (1982).

<sup>190</sup> In most states, suspicionless dog searches are permitted at any traffic stop. See generally *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding such a search does not violate the Fourth Amendment).

<sup>191</sup> Schott, *supra* note 118.

searches except in rare circumstances. And while the issue of inventory searches viewed in light of *Gant* may ultimately make it to the Supreme Court, it is uncertain how the Court would rule. It is possible that the Supreme Court would reject the strategy of using inventory searches if it is clear that the impoundment is merely a pretext for a search without probable cause. Yet, as long as police are careful to make sure that there is an "innocent" explanation of their behavior, the chances are that the Court will allow it. The future use of inventory searches by police is deserving of further research.

#### **A. DOES GANT REPRESENT A FUNDAMENTAL SHIFT IN CRIMINAL PROCEDURE?**

*Arizona v. Gant* certainly sent shock waves through law enforcement in the first few months after it was handed down. The case undid almost thirty years of police practice, and it has the potential to force law enforcement to find new ways to conduct criminal investigations. Only time will tell how great the change may be. Yet, what *Gant* does not appear to be is a fundamental shift in the Court's overall crime control jurisprudence. While *Gant* places limits on police practice, there are few signs within the decision that the case truly represents a paradigm shift. Much of the criticism of *Belton* in the opinions of Justices Stevens and Scalia focus more on the logical flaws in the argument underlying *Belton*'s bright-line rule. The Court did not focus on the rights of the accused in the same way as many dissents by Justices Marshall and Brennan in earlier crime control decisions.<sup>192</sup>

*Gant* also stands alone in recent search and seizure cases. In recent years, most of the Court's criminal procedure decisions have been squarely on the side of crime control. For example, in *Virginia v. Moore*, the Court unanimously ruled that the Fourth Amendment was not violated when police arrested someone for an offense for which state law only permitted a summons, and refused to suppress the evidence of drugs found in the subsequent search incident to arrest.<sup>193</sup> In *Arizona v. Johnson*, the Court reaffirmed the holdings of *Terry v. Ohio*<sup>194</sup> and *Brendlin v. California*,<sup>195</sup> and further held that an officer's questioning about matters unrelated to the original stop does not change the encounter into something other than a lawful seizure.<sup>196</sup> In another 2009 decision, the Court held in *Herring v. United States* that the good-faith exception to the exclusionary rule applied when an officer made an arrest based on an outstanding warrant in another jurisdiction, even though that warrant was invalid.<sup>197</sup> Indeed, with the exception of *Gant*, there have been few criminal procedure decisions in recent years that would indicate a shift in the Court's general approach to the Fourth Amendment. More recently, that trend has continued in the Court's decision in *Berghuis v. Thompson*, which narrowed the

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<sup>192</sup> See, e.g., Justice Brennan's dissent in *Belton v. New York*, 453 U.S. 454, 468 (1981), overruled by *Arizona v. Gant*, 129 S. Ct. 1710 (2008):

Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car.

See also Marshall's dissents in *South Dakota v. Opperman*, 428 U.S. 364, 384-96 (1976), and *United States v. Peltier*, 422 U.S. 531, 544-62 (1975). In *Peltier*, Marshall bitterly states,

If a majority of my colleagues are determined to discard the exclusionary rule in *Fourth Amendment* cases, they should forthrightly do so, and be done with it. This business of slow strangulation of the rule, with no opportunity afforded parties most concerned to be heard, would be indefensible in any circumstances.

*Peltier*, 422 U.S. at 561-62.

<sup>193</sup> 553 U.S. 164 (2008).

<sup>194</sup> 392 U.S. 1 (1968).

<sup>195</sup> 551 U.S. 249, 256-57 (2007) (holding that the driver and all passengers of a vehicle are considered seized for the duration of a lawful traffic stop).

<sup>196</sup> *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009).

<sup>197</sup> 555 U.S. 135; 129 S. Ct. 695, 701 (2009).

applicability of *Miranda* advisements by requiring defendants to explicitly invoke their right to remain silent.<sup>198</sup>

It is also unclear how the Court will decide similar cases in the future. *Gant* was a 5-4 decision, and two members of the majority, Justices Souter and Stevens, have since left the court. While it is not likely that Justice Sotomayor would join with the dissenters to overrule *Gant*, any predictions about how she will vote are certainly premature. Further, while Justice Sotomayor represents a question mark on the Court, the appointment of Elena Kagan to replace Justice Stevens raises even more questions due to her virtually non-existent record on criminal procedure issues.

Regardless of what *Gant* means for the long term future of the meaning of the Fourth Amendment, in the short term, police officers will need to adapt to the decision. Anecdotal evidence certainly indicates that officers and prosecuting attorneys are taking this matter seriously and that it will have an impact on the ability of police to use pretextual stops as a tool in the ongoing effort to limit traffic in illegal drugs. As new cases come to the Court, the extent to which *Gant* marks a sea change will become more apparent. The decision has had an immediate impact on law enforcement, and further research of the decision's reach on police practice and the use of vehicle searches is merited.

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<sup>198</sup> 130 S. Ct. 2250 (2010), *reh'g denied*, *Berghuis v. Thompkins*, 131 S. Ct. 33 (2010).

**BOOK REVIEW****An Interrupted Life: Experiences of Incarcerated Women in the United States<sup>1</sup>**

By Rickie Solinger, Paula C. Johnson, Martha L. Raimon, Tina Reynolds, and Ruby C. Tapia, eds.

Book Review by Kris Miccio, Sturm College of Law, University of Denver

AN INTERRUPTED LIFE is a compilation of essays on the experiences of women inmates which brings home to practitioner, advocate, scholar, and educator what life is like for women behind U.S. prison walls. Much of the literature, as well as popular culture, on prison life is passed through the prism of male experience, and thus gives short shrift to the complicated lives that women lead in prison. Solinger et. al have presented a compendium of essays which address the issues faced by mothers and women of color as they cope with life behind bars and life after prison.

The authors have used storytelling, poetry, and first person accounts to bring to life how women create families behind the walls and sustain families outside prison. An interesting fact which emerges from this book is that the majority of women inmates are mothers of minor children. AN INTERRUPTED LIFE gives insight into how these women maintain their role as mother as well as what they face if that role is interrupted due to their child's placement in foster care. What comes through is that inmates still feel a connection to their children which transcends the bars and the regulated – and at times isolated – life that these incarcerated mothers face.

We also learn how some inmates attempt to reproduce familial units within the prison by becoming involved as mothers to younger inmates, lovers to others, and sisters to sisters. What develops is an intricate system of sisterhood which serves to protect all members of the family structure. Such units also provide the women with sexual intimacy, if that is what they choose, and for some it recasts previous beliefs about sexuality, resulting in a redefinition which can fall outside cultural boundaries.

One interesting aspect of the book is how women inmates resist the oppression that is part of prison life and the loss of privacy that follows a life behind bars. While some resort to violence, many women choose poetry, prayer, or spirituality as a means of refusing the categorization that accompanies prison life. What is clear is that these women use writing, poetry, and spirituality as more than a survival tool but as instruments to redefine themselves and to rise above the grinding life imposed by the state.

AN INTERRUPTED LIFE is not an easy read because it deals with both facts and raw emotion. However, it is an important book for any scholar, lawyer, advocate, or educator who wishes to gain insight into what women inmates face. And it is an interesting counterpoint to those who would find such lives expendable and unworthy of concern. AN INTERRUPTED LIFE is an important book for those of us in the Academy who teach criminal law because it gives insight into the consequences of a system which places human lives outside the ambit of compassion and care. And finally, it is an essential read because it reminds us that the dignity of the human spirit can rise up even behind the walls of U.S. prisons.

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<sup>1</sup> Rickie Solinger, Paula C. Johnson, Martha L. Raimon, eds. *An Interrupted Life: Experiences of Incarcerated Women in the United States*, University of California Press (2010).

## SIXTH AMENDMENT RISING: THE NEWLY EMERGING CONSTITUTIONAL CASE FOR TRIAL BY JURY IN CRIMINAL SENTENCING

Robert Hardaway<sup>1</sup>

*"(We must) remain true to the principles that emerged from the framer's 'fears' that the jury right could be lost not only by gross denial, but by erosion...(A jury must try) all facts necessary to constitute a statutory offense..."*

-Justice Stevens writing for the majority in *Apprendi v. New Jersey* (2000)<sup>2</sup>

### I. INTRODUCTION

The right to trial by jury in criminal cases is enshrined in Article III, Section 2, Clause 3 of the U.S. Constitution which provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."<sup>3</sup> Although this appears to render superfluous the Sixth Amendment guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a...trial by an impartial jury,"<sup>4</sup> the repeat of this right in the Bill of Rights serves to highlight its importance in the minds of the framers.

Likewise, in civil suits at common law where the amount in controversy exceeds twenty dollars, the Seventh Amendment provides that "the right to trial by jury shall be preserved..."<sup>5</sup>

The Seventh Amendment, unlike the Sixth,<sup>6</sup> has never been found to be an essential element of due process, and thus has never been applied to the states via incorporation into the Due Process Clause of the Fourteenth Amendment.<sup>7</sup> Nevertheless, the Supreme Court has been meticulous in enforcing its provisions to the letter in the federal courts, holding that civil

<sup>1</sup> Professor of Law, University of Denver Sturm College of Law. The views expressed herein are my own and do not necessarily reflect the views of any of my colleagues at the Sturm College of Law. I also wish to acknowledge and give credit to Judge Morris B. Hoffman, District Judge for the Second Judicial District of Colorado. I have borrowed liberally from his excellent article in the Duke Law Journal which was published in 2003 and entitled *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003). Although that article focused primarily on the historical, empirical and policy case for jury sentencing, his seven page constitutional case for jury sentencing set forth the most articulate constitutional case for jury sentencing in the aftermath of *Apprendi*, and provided the seeds and basis for what is essentially my 2003-2010 update to his constitutional case.

<sup>2</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 483-84 (2000).

<sup>3</sup> U.S. CONST. art. III § 2, cl.3. However, unlike the 6<sup>th</sup> amendment, art. III § 2, cl. 3 does not state that it applies to "all criminal prosecutions." U.S. CONST. amend. VI.

<sup>4</sup> U.S. CONST. amend. VI; *Skilling v. U.S.*, 130 S. Ct. 2896, 2912-13 (2010); *Berghuis v. Smith*, 130 S. Ct. 1382, 1396 (2010) (Thomas, J. concurring); *Ring v. Arizona*, 536 U.S. 584, 597 n. 3 (2002); *Harris v. U.S.*, 536 U.S. 545, 549 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000); *U.S. v. Rodriguez- Moreno*, 526 U.S. 275, 278 (1999); *Lewis v. U.S.*, 518 U.S. 322, 325 (1996); *U.S. v. Gaudin*, 515 U.S. 506, 509-10 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

<sup>5</sup> U.S. CONST. amend. VII; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 445 (2001) (Ginsburg, J. dissenting); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 n.22 (1999); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999).

<sup>6</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>7</sup> *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (citing *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876)); *Id.* at n. 14; See also Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, n. 72 (2003).

litigants in suits at common law have a right to a jury in both phases of the civil trial. Specifically, civil litigants have a right to have a jury determine both the defendant's liability, as well as the amount of damages to which a plaintiff is entitled if liability is determined.<sup>8</sup>

Given the court's scrupulous upholding and enforcement of the Seventh Amendment's right to a jury in all phases of civil cases involving complaints for money, it is all the more surprising that in criminal cases, where an accused faces loss of liberty or even death, many courts -- indeed, most courts -- routinely deny an accused the right to jury in the most critical phase of the criminal trial, namely the sentencing phase.<sup>9</sup> While courts routinely accord an accused a right to a jury in the guilt or innocence phase,<sup>10</sup> an accused's actual sentence is routinely left to the mercy of an individual judge who, depending on his mood or predilection, has the broadest discretion in imposing a sentence. Not surprisingly, such a sentence may range anywhere from no punishment at all, punishment that is suspended along with probation, to life imprisonment.<sup>11</sup>

Inexplicably, most legislative attempts to address this kind of unbridled judicial discretion have come not in the form of simply requiring judicial adherence to the Sixth Amendment, but rather by promulgating so-called "sentencing guidelines."<sup>12</sup> The success of such guidelines is unclear however; specifically such success is unclear in light of judicial attempts in some lower courts to undermine or bypass this type of limitation on judicial discretion.<sup>13</sup> In fact, higher courts have also attempted to bypass these limitations; leading these courts into thickets of legal obfuscation so dense that one senses desperation on their part in later cases to somehow find a way out of them.<sup>14</sup>

Interestingly, if a federal court today held that the right to a jury in civil cases extended only to the *first half* of a civil trial and then denied the right of a plaintiff to have his damages determined by a jury, there would be an explosion of outrage. Such outrage would reflect a blatant denial of the rights guaranteed by the Seventh Amendment, not only on the part of the trial bar, but by the general citizenry—and rightly so. What is the explanation, then, for such general acquiescence to the right of men and women being marched into captivity based on

<sup>8</sup> See, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996); *Chauffeurs v. Terry*, 494 U.S. 558 (1990); *Colgrove v. Battin*, 413 U.S. 149 (1973); *Ross v. Bernhard*, 396 U.S. 531 (1970); *Katchen v. Landy*, 382 U.S. 323 (1966); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *I.L.C. v. IBM*, 458 F. Supp. 423 (N.D. Cal. 1978). Judge Morris Hoffman, in his Duke Law Review article "The Case for Jury Sentencing" has set forth in comprehensive detail the high court cases which have attempted to distinguish the Sixth and Seventh Amendments and explain why a civil litigant is accorded a right to jury in both phases of a civil trial, but an accused only has a right to jury in the first phase of a criminal trial. See e.g., Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003). Accordingly, no attempt is made to treat that subject here.

<sup>9</sup> Hoffman, *supra* note 7, at 4; Ark. Code Ann. § 5-4-103 (1987); Mo. Ann. Stat. § 557.036 (West 1999); Okla. Stat. Ann. tit. 22, §§ 926.1, 927.1 (West Supp. 2003); Tex. Code Crim. Proc. Ann. art. 37.07(2)(b) (West 2006); Va. Code Ann. § 19.2-295 (West 2007).

<sup>10</sup> *Libretti v. United States*, 516 U.S. 29, 49 (1995); *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

<sup>11</sup> Hoffman, *supra* note 7, at 987, 994-95; *U.S. v. Booker*, 543 U.S. 220, 233 (2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000); *Williams v. New York*, 337 U.S. 241, 246 (1949)); See also *Apprendi*, 530 U.S. 466, 547-48 (2000) (O'Connor, J. dissenting).

<sup>12</sup> 18 U.S.C.A. § 3553; USSG; 28 U.S.C.A. § 994 (describing Sentencing Commission's duties); *Booker* 543 U.S. at 245; Jackson Jones, *The United States Sentencing Guidelines are not Law!: Establishing the reasons "United States Sentencing Guidelines" and "Ex Post Facto Clause" Should Never be used in the Same Sentence*, 32 U. La Verne L. Rev. 7, 14-17 (2010) (describing the history and purposes of the federal sentencing guidelines).

<sup>13</sup> See e.g. *United States v. Carty*, 520 F.3d 984, 994-95 (9th Cir. 2008); *United States v. Bowers*, 242 Fed. Appx. 558, 559-60 (10th Cir. 2007); *United States v. Burdick*, 100 F.3d 882, 884-86 (10th Cir. 1996).

<sup>14</sup> See e.g. *Cunningham v. California*, 549 U.S. 270 (2007); *Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Walton v. Arizona*, 497 U.S. 639 (1990); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Patterson v. New York*, 432 U.S. 197, 210 (1977).



the decision of a single man or woman? More pointedly, was this what the framers had in mind when they promulgated the Sixth Amendment command to provide an accused the right to a trial by jury in all criminal cases? And if it was not, what is the explanation for how the Sixth Amendment right to a jury trial came to be so diluted during the same period of American judicial history when the Seventh Amendment came to be so meticulously and scrupulously adhered to?

The public policy arguments in favor of jury sentencing can already be found in scholarly literature. Notably, Chief Justice William Rehnquist has remarked that "[i]ndividual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments."<sup>15</sup>

Standing in stark contrast to the current sentencing norms, military courts feature a court panel (analogous to the jury in civilian courts) which decides both guilt as well as punishment, if necessary. As a JAG officer, I practiced in these latter courts and I was always impressed by the fairness of sentences imposed by the jury. Also impressive was the procedure under which an accused was able to present his own extenuation and mitigation evidence without fear that a heavily bureaucratized probation department would attempt to influence the court with reports featuring hearsay and other uncross-examined sources.<sup>16</sup>

Currently a handful of states provide its accused with the right to a jury trial during sentencing.<sup>17</sup> However, following the lead of Chief Justice Rehnquist, there have been a number of scholars who have made an empirical and public policy case for jury sentencing in criminal cases.<sup>18</sup> In fact, one of the more persuasive and eloquent public policy cases for jury sentencing has been recently set forth by Yale law student Adriana Lanni in a Note in the Yale Law Journal<sup>19</sup> -- which garnered praise from Denver District Court Judge Morris Hoffman as the "first article in eighty-one years to call for a return to jury sentencing."<sup>20</sup>

With the Chief Justice's public policy case for jury sentencing foundationally in mind, along with the 2000 Supreme Court decision in *Apprendi v. New Jersey*,<sup>21</sup> and also Judge Hoffman's remarkable article<sup>22</sup> in the Duke Law Journal, this article will focus on the constitutional case for jury sentencing in criminal cases.

<sup>15</sup> *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, J. dissenting).

<sup>16</sup> See 57 C.J.S. *Generally* § 580 (2010); 57 C.J.S. *Deliberations and Voting* § 585 (2010)

<sup>17</sup> ARK. CODE ANN. § 5-4-103 (West 1997); MO. ANN. STAT. § 557.036 (West 1999); OKLA. STAT. ANN. tit. 22, §§ 926.1, 927.1 (West 2011); TEX. CODE CRIM. PROC. CODE ANN. art. 37.07(2)(b) (Vernon 1981); VA. CODE ANN. § 19.2-295 (West 2000) (as cited in Hoffman, *supra* note 7, at 953 n.1 as the only five states that allow for jury sentencing for noncapital offenses); Hoffman, *supra* note 7, at 954 n.4 ("Of the thirty-eight states with capital punishment, twenty-nine leave the sentencing decision to the jury. At least before *Ring v. Arizona*, 536 U.S. 584 (2002), only five states--Arizona, Colorado, Idaho, Montana, and Nebraska--gave the trial court judge, or a panel of judges, the exclusive power to decide the capital punishment issue.").

<sup>18</sup> Hoffman, *supra* note 7; Adriann Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999).

<sup>19</sup> Lanni, *supra* note 18.

<sup>20</sup> Hoffman, *supra* note 7, at 951 n.d1.

<sup>21</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 483-84 (2000).

<sup>22</sup> Hoffman, *supra* note 7, at 968-85.

## II. HISTORY

Although the phrase "shall be preserved" regarding the right to jury trial is found only in the Seventh Amendment,<sup>23</sup> and not the Sixth, it follows that the right to jury trial in criminal cases was likewise meant to preserve the right to jury in criminal cases as it existed at the time that both Section III and the Sixth Amendment were ratified. As Judge Hoffman has noted, judges at common law had almost no discretion in imposing sentences at the relevant time since "[m]ost offenses had mandatorily set punishments."<sup>24</sup> Accordingly, the judge's role in sentencing was largely perfunctory and formalistic, and was, therefore, "simply to announce the mandatory punishment."<sup>25</sup> Because these juries effectively imposed punishment by the simple expedient of deciding what crime the accused was guilty of, it was inconceivable at that time that the judge would in any way interfere with the jury's constitutional power to impose a sentence.

Although "judges sentenced in name only,"<sup>26</sup> an illusion was nevertheless created in the minds of future jurists that judges had actually been imposing sentences all along rather than simply ritualistically announcing the sentence for the record. As the common law practice of jury sentencing as it existed at ratification receded in the collective judicial memory, judges began a gradual usurpation of the traditional common law jury function of imposing sentences in criminal cases.<sup>27</sup> Such gradual usurpations were created, in large part, by the muddling of the waters by legislative promulgations that created the "indeterminate sentence."<sup>28</sup> Such legislative promulgations created an indisputably visible spectacle of a present day judge confidently announcing a sentence – even mechanistically – from the bench and would eventually have far reaching consequences for constitutional analysis.

It was not long before the common law practice in effect at the time of constitutional ratification became totally lost in the collective judicial memory. As a consequence of such memory loss, judges began a lengthy and effective usurpation of the constitutional function of the criminal jury without serious constitutional challenge.<sup>29</sup> In fact, it was not until the modern era that serious constitutional challenges to the usurpation of the jury function in criminal cases were raised, a number of which arose in death penalty cases.<sup>30</sup> In 1984, *Spaziano v. Florida*,<sup>31</sup> for

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<sup>23</sup>*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (citing *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 537 (1958)); *Markman v. Westview*, 517 U.S. 370, 376 (1996); *Tull v. U.S.*, 481 U.S. 412, 425-26 (1987) (quoting *Colgrove v. Battin*, 413 U.S. 149, 157 (1973)); *Colgrove*, 413 U.S. at 153 (1973); *Id.* at 171 (Marshall, J., dissenting).

<sup>24</sup> Hoffman, *supra* note 7, at 962.

<sup>25</sup> *Apprendi*, 530 U.S. at 479 (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900*, pp. 36-37 (Antonio Padoa-Schioppa ed. 1987)) ("Thus, with respect to the criminal law of felonious conduct, 'the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence ....'"); Hoffman, *supra* note 7, at 962.

<sup>26</sup> Hoffman, *supra* note 7, at 963.

<sup>27</sup> See Hoffman, *supra* note 7, at 964-65; John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J. L. & PUB. POL'Y 119, 119-21 (1992); Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 95-96 (2006); Ronald Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1374-75 (1999) ("Enthusiasm for sentencing juries grew out of an American passion for juries as the institution that best enabled citizens to participate in their own government. This conviction was never stronger than during the early nineteenth century. It was early in the twentieth century when states started to limit or abandon jury sentencing and to give judges the power to set the initial sentence in every case.").

<sup>28</sup> Hoffman, *supra* note 7, at 1001.

<sup>29</sup> See sources cited *supra* n. 26.

<sup>30</sup> *Ring v. Arizona*, 536 U.S. 584 (2002); *Walton v. Arizona*, 497 U.S. 639 (1990); *Spaziano v. Florida*, 468 U.S. 447 (1984). See also such non death penalty cases as *Blakely v. Washington*, 542 U.S. 296

example, featured an accused who was sentenced to death by a judge despite a jury recommendation of a life sentence. Although the accused appealed his sentence primarily on Eighth Amendment grounds, the court was blindsided by a secondary claim that the judge had violated the accused's Sixth Amendment rights by usurping the jury sentence. In addressing this claim, an apparently non-plussed majority could not muster a single case in support of its dictum that "[t]he Sixth amendment has never been *thought* to guarantee a right to a jury determination of that [death penalty] issue."<sup>32</sup>

The court's tentative dictum that the right to a jury trial in criminal sentencing has not been "thought" to be a Sixth Amendment right appears far removed from an outright assertion, with authority, that there is no Sixth Amendment right to a jury in the second phase of a criminal trial. Additionally, it should be kept in mind that *Spaziano*, and presumably its feeble dictum, was undermined by a 2002 decision, *Ring v. Arizona*, in which the Court held that it was a violation of the Sixth Amendment for a judge to decide whether there were aggravating factors justifying execution.<sup>33</sup> In fact, the concurring opinion in *Ring* went even further, concluding that the Constitution requires "jury sentencing in capital cases..."<sup>34</sup>

Judicial resistance to acknowledgment of a Sixth Amendment right to jury sentencing however still exists and is often attributed to dictum in such cases as the 1986 case, *McMillan v. Pennsylvania* ("There is no Sixth Amendment right to jury sentencing..."),<sup>35</sup> though *Ring* could muster only the later discredited *Spaziano* case in support of this contention.

In any case, any dictum regarding a Sixth Amendment right to sentencing which was handed down prior to 2000 must now be reevaluated in the aftermath of *Apprendi* and its progeny, initiating an evolution in Sixth Amendment jurisprudence comparable in scope to the evolution of Fifth Amendment jurisprudence which occurred in the aftermath of *Miranda v. Arizona*.<sup>36</sup>

### III. APPENDI V. NEW JERSEY

In the 2000 Supreme Court case *Apprendi v. New Jersey*,<sup>37</sup> the accused fired several shots into the home of an African American couple and was subsequently charged with second degree possession of a weapon for an unlawful purpose which carried a 5-10 year term, but was notably not charged with violation of a separate hate crime statute. After the defendant pled guilty to the firearms charge, however, the judge found by a preponderance of the evidence that the shooting was racially motivated, a factor which if found enhanced punishment under the statute, and sentenced the accused to a 12-year term. The accused appealed on grounds

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(2004) (kidnapping); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (possession of firearm and antipersonnel bomb); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (possession of firearm during commission of enumerated felony).

<sup>31</sup> *Spaziano*, 468 U.S. at 449.

<sup>32</sup> *Id.* at 459 (emphasis added).

<sup>33</sup> *Ring*, 536 U.S. at 609.

<sup>34</sup> *Id.* at 614 (Breyer, J. concurring). Interestingly, this assertion of a constitutional right to sentencing in capital cases was based on the Eighth rather than Sixth Amendment. This is somewhat curious as the Eighth Amendment has generally been applied in the context of the nature of the punishment itself rather than the procedures under which the punishment was imposed. See, e.g., *Ring*, 536 U.S. at 610 (Scalia, J. concurring) (quoting *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J. dissenting) "[T]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed").

<sup>35</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 80 (1986).

<sup>36</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). See also cases that came after *Miranda*, such as *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010); *U.S. v. Patane*, 542 U.S. 630 (2004); *Dickerson v. U.S.*, 530 U.S. 428 (2000); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Rhode Island v. Innis*, 446 U.S. 291 (1980).

<sup>37</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000).

that the Due Process clause requires that any fact that increases the penalty for the crime beyond the statutory minimum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.<sup>38</sup>

Because the trial judge had enhanced the punishment of the defendant based on his own personal factual finding of racial motivation rather than on any jury finding of racial motivation, the Court held that New Jersey's practice violated the accused's due process rights. Specifically, the Court held that, except for the fact of a prior conviction: "... any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>39</sup> The Court went on to make clear that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."<sup>40</sup> It cited with approval a common law doctrine which holds that:

[w]here a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. If, then, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only."<sup>41</sup>

Thus, with one fell swoop, the Court cast away many of the fine distinctions that theretofore had been made between the need for jury determination of facts which were "elements" of a crime, and facts which were merely "factors" in determining mitigation of punishment<sup>42</sup>, holding that, regardless of classification as an element or "sentencing factor," "[o]ther than the fact of a prior conviction, any [emphasis added] fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. . . ." <sup>43</sup>The

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<sup>38</sup>*Id.* at 476-77 (quoting *U.S. v. Gaudin*, 515 U.S. 506, 510 (1995)).

At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt [citations omitted]."

<sup>39</sup> *Id.* at 490 (emphasis added).

<sup>40</sup> *Id.* (quoting *Jones v. U.S.*, 526 U.S. 227, 252-53 (1999) (Stevens, J. concurring); see also *Jones*, 526 U.S. at 253 (Scalia, J. concurring)).

<sup>41</sup> *Apprendi*, 530 U.S. at 480-81 (quoting 2 M. Hale, *Pleas of the Crown*, in turn cited in J. Archbold, *Pleading and Evidence in Criminal Cases*, 15th ed. 44, 51 (1862)).

<sup>42</sup> See, e.g., *Patterson v. New York*, 432 U.S. 197, 210 (1977).

We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously limits beyond which the States may not go in this regard.

<sup>43</sup> *Apprendi*, 530 U.S. at 490.

dissent in *Apprendi*, transparently horrified at the implications of the majority opinion, noted that while "all facts necessary to constitute a statutory offense"<sup>44</sup> must be tried by a jury – the majority opinion "casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder."<sup>45</sup> Uncontrovertibly, the dissent recognized that the Court had set forth an "extraordinary rule."<sup>46</sup>

But just how extraordinary?

If the only implication of the majority decision was to set forth yet another judicial guideline for applying the legislature's federal sentencing guidelines, there would be little cause for alarm on the part of those who fear its logical extension—namely, that the accused has a Sixth Amendment right to a jury not just in the first phase of a criminal trial, but also in the second, and more critical phase, of sentencing.

#### IV. BREAKING THE DOCTRINAL DEADLOCK

As early as 2003, Judge Hoffman made the case that in a pair of post-*Apprendi* cases, *Ring v. Arizona*<sup>47</sup> and *Harris v. U.S.*,<sup>48</sup> the Court appeared to have dug itself into a doctrinal conundrum from which the only escape was recognition of the original premise of the Sixth Amendment: to provide to an accused the right of trial by jury in all phases of the criminal trial.<sup>49</sup>

Hoffman's constitutional case for jury sentencing began by recalling that while *Apprendi* required that "any fact other than a prior conviction that increases the maximum penalty for a crime" must be tried by jury, it left open the question of whether the Sixth Amendment also required that any fact that increased the minimum requirement also be tried by a jury.<sup>50</sup>

Hoffman noted that in the 2002 case of *Ring v. Arizona*,<sup>51</sup> the Court cleanly applied the *Apprendi* doctrine in striking down, on Sixth Amendment grounds, an Arizona statute which permitted a judge to determine the aggravating factors for imposition of the death penalty. In *Harris v. U.S.*,<sup>52</sup> however, decided the same day as *Ring*, the Court upheld a statute which mandated a seven-year minimum sentence upon a judicial finding that the accused had brandished a gun. This pair of cases, taken together, therefore appeared to answer the question left open by *Apprendi* by holding that judicial findings of facts that might increase a *maximum* sentence are necessarily to be considered as "elements" of a crime regardless of whether they are labeled as elements or sentencing factors by a legislature, and must be decided by a jury; but those judicial findings which required imposition of a *minimum* sentence, and legislatively determined to be mere "sentencing factors," pass Sixth Amendment muster if decided by a judge alone.

Judge Hoffman recognized the conundrum posed by these two cases, pointing out that they have created an "impossibly difficult saddle point:"

If the Sixth Amendment means anything, it must mean that legislatures cannot deprive criminal defendants of their right to jury trial by the simple artifice of labeling elements as "sentencing factors"; yet there seems to be no principled basis upon which to distinguish elements from sentencing factors. This dilemma is so sharp that the slightest change of

<sup>44</sup>*Id.* at 483.

<sup>45</sup> *Id.* at 525.

<sup>46</sup> *Id.*

<sup>47</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>48</sup> *Harris v. U.S.*, 536 U.S. 545 (2002).

<sup>49</sup> Hoffman, *supra* note 7, at 982.

<sup>50</sup> *Id.* at 981.

<sup>51</sup> Hoffman, *supra* note 7, at 980 (describing *Ring v. Arizona*, 536 U.S. 584 (2002)).

<sup>52</sup> *Harris*, 536 U.S. at 552.

perspective or wording by one or two Justices seems to have a magnified effect on outcomes in these cases.<sup>53</sup>

Contrary to Judge Hoffman's observation, however, the *Ring-Harris*<sup>54</sup> pair did provide a basis for distinguishing between "elements" which must be decided by a jury, and "sentencing factors" which may be tried by a judge—namely, that factors which increase the maximum must be treated as "elements" regardless of legislative labeling, while factors which increase the minimum may be treated as sentencing factors if labeled as such legislatively.

The conundrum, therefore, is not to be found in any ambiguity in the setting forth of the principle, but rather in the doctrinal soundness of the principle itself, and perhaps this is what Judge Hoffman meant in his assertion that *Ring-Harris* set forth no "principled" basis for distinguishing between elements and sentencing factors. It should also be noted, however, that Hoffman's claim that legislatures now have a free path to bypass *Apprendi* by the simple expedient of "increasing maximum sentences to accommodate what would otherwise have been an enhanced sentence and then imposing higher and/or mandatory minimum sentences to reflect the enhancement" was thoroughly addressed in *Apprendi* by Justice Stevens who opined that if legislatures attempted any such course, the Court would consider whether it was constitutional by falling back on such pre-*Apprendi* decisions as *Patterson*<sup>55</sup> and *Mullaney*.<sup>56 57</sup>

Nevertheless, the post-*Apprendi* cases decided up to and including those decided through 2010 which have attempted to tread the ultimately hapless doctrinal path through the *Ring-Harris* thicket<sup>58</sup> do support Judge Hoffman's conclusion, first articulated in 2003 in the aftermath of that pair of cases, that the only principled way for the court to escape the current doctrinal morass is to hold that under the Sixth Amendment "judges will not ... be able to impose any sentences."<sup>59</sup>

<sup>53</sup> Hoffman, *supra* note 7, at 982.

<sup>54</sup> See 536 U.S. 584, 604-06 n.5, 609 (2002); 536 U.S. 545, 557-561 (2002).

<sup>55</sup> *Patterson v. New York*, 432 U.S. 197 (1977).

<sup>56</sup> *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

<sup>57</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000) ("The principal dissent would reject the Court's rule as a 'meaningless formalism,' because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. *Post*, at 2388-2390. While a State could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests, *post*, at 2389—extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range—this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged 'to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices' of exposing all who are convicted to the maximum sentence it provides. *Patterson v. New York*, 432 U.S., at 228-229, n. 13, (Powell, J., dissenting). So exposed, '[t]he political check on potentially harsh legislative action is then more likely to operate.' *Ibid*. In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, *post*, at 2390), we would be required to question whether the revision was constitutional under this Court's prior decisions. See *Patterson*, 432 U.S., at 210, 97 S.Ct. 2319; *Mullaney v. Wilbur*, 421 U.S. 684, 698-702, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)").

<sup>58</sup> See, e.g., *Dillon v. United States*, 130 S.Ct. 2683, 2692 (2010); *United States v. O'Brien*, 130 S.Ct. 2169, 2173-2175 (2010); *Oregon v. Ice*, 129 S.Ct. 711, 716-18 (2009); *Rita v. United States*, 551 U.S. 338, 352-55 (2007); *Cunningham v. California*, 549 U.S. 270, 282-89 (2007); *United States v. Booker*, 543 U.S. 220, 230-38 (2005); *Shepard v. United States*, 544 U.S. 13, 24-27 (2005); *Blakely v. Washington*, 542 U.S. 296, 301-06 (2004); *Schriro v. Summerlin*, 542 U.S. 348, 353-56 (2004).

<sup>59</sup> Hoffman, *supra* note 7, at 985.

## V. CONCLUSION

The central holding of *Apprendi* that the Sixth Amendment requires that "all facts necessary to constitute a statutory offense" must be "tr(ied) to a jury"<sup>60</sup> has laid the foundation for establishing the principle originally envisioned by the framers of establishing a wide barrier between an accused and the vast power of the state.<sup>61</sup> The gradual judicial usurpation of the accused's right to a jury during the second critical phase of the criminal trial confirms the Sixth Amendment framers' fear "that the jury right could be lost not only by gross denial, but by erosion."<sup>62</sup> Such judicial usurpation also stands in dire contrast to the continued and meticulous judicial recognition of the right to a jury in all phases of the civil trial under the Seventh Amendment.<sup>63</sup>

There exists no precedential or *stare decisis* barriers to recognition of a Sixth Amendment guarantee to an accused's right of trial by jury in the most critical sentencing phase of his trial, either in the unsupported dictum of the pre-*Apprendi* cases<sup>64</sup> or in dictum in post-*Apprendi* cases referring to pre-*Apprendi* cases.

Only a full recognition of the rights guaranteed by the Sixth Amendment can resolve the current doctrinal mass of cases, particularly those cases that have become entangled in attempting to reconcile both state and federal cases applying sentencing guidelines.<sup>65</sup>

Although the doctrinal leap from the *Apprendi* holding to one recognizing a Sixth Amendment right to jury sentencing would be a relatively small one, the practical implications would be significant for the criminal justice system. Notably though, the court in recent years has not hesitated to make similar dramatic doctrinal expansions in the criminal justice field. For example, in the 2004 case of *Crawford v. Washington*,<sup>66</sup> the Supreme Court did not hesitate to abandon the holding of *Roberts v. Ohio*, which had held that the Sixth Amendment Confrontation clause could be satisfied without physical confrontation of a witness in court by a showing that a witness was unavailable and that his out of court statement satisfied a "firmly rooted" hearsay exception.<sup>67</sup> In that case, the court discarded many decades of judicial precedent, and instead relied upon common law practice as it existed in 1791.<sup>68</sup>

Additionally, and as recently as June of 2010, the Supreme Court, examining practice and legislative history from 1791, overturned 70 years of precedent and a consensus of circuit cases<sup>69</sup> to hold that the Second Amendment was an individual rather than collective right.<sup>70</sup>

<sup>60</sup> *Apprendi*, 530 U.S. at 483.

<sup>61</sup> *Id.* at 477 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)).

<sup>62</sup> *Id.* at 483 (quoting *Jones v. United States*, 526 U.S. 227, 248 (1999)).

<sup>63</sup> See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376-83 (1996); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-67 (1990); *Colgrove v. Battin*, 413 U.S. 149, 152-64 (1973); *Ross v. Bernhard*, 396 U.S. 531 (1970); *Katchen v. Landy*, 382 U.S. 323, 336-40 (1966); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 471-79 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 444-49 (N.D. Cal. 1978).

<sup>64</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984). Discussed *supra* p. 6.

<sup>65</sup> See, e.g., *Dillon v. United States*, 130 S. Ct. 2683 (2010); *United States v. O'Brien*, 130 S. Ct. 2169 (2010); *Oregon v. Ice*, 555 U.S. 160 (2009); *Rita v. United States*, 551 U.S. 338 (2007); *Cunningham v. California*, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

<sup>66</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>67</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>68</sup> 541 U.S. at 54-59.

<sup>69</sup> See, e.g., *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) ("The second amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'") (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)); *United States v. Chavez*, 204 F.3d 1305, 1313 n.5 (11th Cir. 2000); *United States v. Baker*, 197 F.3d 211, 216 (6th Cir. 1999); *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124-25 (9th Cir. 1996); *Hickman v. Block*, 81 F.3d 98, 100-01 (9th Cir. 1996); *Quilici v. Morton Grove*, 695 F.2d 261, 270-71 (7th Cir. 1982); *United States v.*

Nevertheless, any future judicial attempts to make such a doctrinal leap will doubtless become mired in the conceptual sinkholes opened up by such post-*Apprendi* cases as *U.S. v. Booker* (which can be read as requiring application of *Apprendi* only in the context of mandatory sentencing guidelines, and leaves open the possibility of judge sentencing in a non-mandatory sentencing regime)<sup>71</sup>, and *Oregon v. Ice*<sup>72</sup> (which held that the Sixth Amendment does not inhibit a judge from finding facts relevant to whether consecutive rather than concurrent sentences should be imposed.)

It is therefore submitted that only a clean doctrinal leap in the form of a clear cut holding that a defendant in a criminal case has a Sixth Amendment right to have his sentence determined by a jury can extricate the courts from the current doctrinal morass while at the same time serving both the spirit and letter of the constitutional right to jury in both phases of the criminal trial.

As has already occurred in Fifth Amendment<sup>73</sup> and Confrontation<sup>74</sup> jurisprudence, half a loaf, and even three quarters of a loaf, must inevitably give way to a full one.

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Oakes, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Wilbur*, 545 F.2d 764, 767 (1st Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921-23 (1st Cir. 1942); see also Robert Hardaway, *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMMENT. 41, 43 n.12 (2002) (providing a more extensive list of supporting cases).

<sup>70</sup> *District of Columbia v. Heller*, 554 U.S. 570, 595 (2010).

<sup>71</sup> *Booker*, 543 U.S. at 334 (Breyer, J. dissenting)

Thus, as far as the federal statutes are concerned, the federal system, unlike the state system at issue in *Blakely*, provides a defendant with no guarantee that the jury's finding of factual elements will result in a sentence lower than the statutory maximum. Rather, the statutes put a potential federal defendant on notice that a judge conceivably might sentence him anywhere within the range provided by statute—regardless of the applicable Guidelines range. Hence as a practical matter, they grant a potential federal defendant less assurance of a lower Guidelines sentence than did the state statutes at issue in *Blakely*.

<sup>72</sup> ICE, 129 S.Ct. at 718

In light of this history, legislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted our decision in *Apprendi*. There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused. Instead, the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice.

<sup>73</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>74</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).